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Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 28, 1987

VOLUME I

QUESTIONS PRESENTED

1. After recognizing "historical disparity" in the pay, promotion, and tenure of women and men faculty, whether the Ninth Circuit failed to follow Bazemore by concluding that there was no violation of Title VII unless defendant intentionally failed to remedy the disparity.

2. Whether the Ninth Circuit failed to follow Teamsters, Burdine, Aikens, and Bazemore by concluding that defendant has no burden to provide evidence of the reason for the proven disparity?

3. Whether the Ninth Circuit failed to follow Bazemore by not recognizing that less than all measurable variables may serve to prove plaintiffs' case.

4. Whether the Ninth Circuit failed to follow Burdine by not affording

plaintiffs a full and fair opportunity to demonstrate pretext.

5. Whether the Ninth Circuit violated the intent of Congress by not holding academic employers to the same standard as other employers.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Anna Penk, et al, on behalf of a class of faculty women as variously defined by the District Court, and their employer, the Oregon State Board of Higher Education.[1]

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[1]The names of the other plaintiffs are Elaine Spencer, Bernice Gilmore, Madronna Holden, Betty Leonard, Lois Schreiner, G. Joanne Amspoker, Margaret Lumpkin, Mary H. Davison, Rosemary Dunn Dalton, Sherry McLeod Mihel, Polly Ann Fisher, Lorraine B. Furby, Ann L. Hoffstetter, Margaret A. Huntley, Dianna L. Kale, Mary Ann Petry, Carol E. Rathe, Jane M. Siegel, Barbara J. Stewart, Ruth Waugh, Michele Wollert, all petitioners herein except Sherry McLeod Mihel who did not participate in the appeal to the Ninth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

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ANNA PENK, ET AL, Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Anna Penk, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 29, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is

reported at 816 F.2d 458, and is reprinted in the Appendix hereto, Volume I, p. 1 - 42, infra.

The opinion of the United States District Court for the District of Oregon is partially reported at 36 C.C.H. Employment Practices Par. 35,049, and is reprinted in the Appendix hereto, Volumes II and III of this Petition, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Sec. 2000e-5(f)(3), which is reprinted in the Appendix hereto, Volume I, p. 44, petitioners brought this suit in the District of Oregon on April 25, 1980. The class was certified on October 13, 1981. Judgment was entered on March 29, 1985 granting relief to three individual plaintiffs and dismissing the other individual cases and the class claim.

On petitioners' appeal, the Ninth Circuit entered a judgment and opinion affirming the District Court on April 29, 1987. No petition for rehearing was sought.

Plaintiffs seek attorneys' fees on appeal pursuant to 42 U.S.C. 2000e-5(k), which is reprinted in the Appendix hereto, Volume 1, p. 44, of this Petition.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

28 U.S.C. 42, Sec. 2000e-2, which is reprinted in the Appendix hereto, Volume I, p. 43, infra; Chapter 351 of Oregon Revised Statutes, which is reprinted in the Appendix hereto, Volume I, p. 45 - 76 of this Petition.

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STATEMENT OF THE CASE.

1. Summary

Penk v. Oregon State Board of Higher Education was brought by twenty-two women faculty members on behalf of themselves and approximately 2,000 other women faculty within the state system. The Board has the duty to govern higher education throughout the State of Oregon. Or. Rev. Stat. Ch. 351. It supervises eight colleges and universities.

In this action, plaintiffs alleged that the Board discriminated against them individually because of their sex, in violation of Title VII, 42 U.S.C. Sec. 2000e-2(a). They sought money damages on their individual claims. Plaintiffs also alleged that the Board engaged in a pattern or practice of sex discrimination against women faculty members as a class, and on this basis sought class-wide money

damages and injunctive relief (CR 256).

Specifically, plaintiffs asserted in their individual and class cases that, because of their sex, they have been discriminated against in pay, rank, tenure, and administrative appointments. The individual plaintiffs, in addition, claimed discrimination in matters of staff support, office space, sabbatical leave, and related employment issues (CR 256).

This action was filed on April 25, 1980 (CR 1). The class was certified on October 13, 1981, but was not fully defined until December 10, 1982 (CR 99; 241). Trial commenced on February 8, 1984 (CR 490). Plaintiffs' last witness testified on May 2, 1984, and plaintiffs rested on May 29, 1984 (CR 555); defendant then filed a motion to dismiss the individual and class claims for

failure to prove a prima facie case and a motion to decertify the class (CR 563). On August 10, 1984, the court denied the motions to dismiss. The court did, however, limit the class to "regular teaching faculty" (CR 609).

Defendant's first witness testified on May 23, 1984, and its case continued through October 22, 1984 (CR 666). Plaintiffs were then allowed to present approximately five days of rebuttal evidence (CR 670-73). Thereafter, defendant's statistical experts testified, on October 29 through November 8, after which plaintiffs presented approximately one and one half days of additional rebuttal testimony (CR 673a & b; 679a; 681; 681a; 682; 682b; 682c; 682d; 687a). Two of plaintiffs' key rebuttal experts, however, were prevented from testifying (CR 641; 668).

Defendant's expert was the final witness on November 9, 1984 (CR 687a). The court heard closing argument on November 20, 1984 (CR 696).

On February 13, 1985, the court rendered its decision: three of the named plaintiffs had proved intentional discrimination on the basis of sex; defendant prevailed on all other claims (CR 716).

Evidence produced both by plaintiffs and defendant demonstrated disparities in pay, rank and tenure at all eight institutions. Since neither the District Court nor the Ninth Circuit made specific findings about the extent of the disparity between men and women, it is necessary to present in summary form the statistical evidence introduced by both parties.

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2. Plaintiffs' statistical evidence established unexplained disparities on the basis of sex at every institution in every year studied in pay, rank, and tenure decisions.

a. Salary Studies.

(i) Gross salary averages.

Plaintiffs introduced statistical evidence of the average salaries earned by men and women for each year and each institution in the Oregon State System of Higher Education (Pl. Ex. 1, Tables 1-9). A typical value is seen in 1979-80, the year that this lawsuit was filed; the women faculty in the Oregon State System of Higher Education were paid on the average thirty percent less than the men faculty (TR 1705).

(ii) Multiple regression analysis of salary.

To account for differences in education and experience levels of men and women, and for overall salary

differences due to the higher proportions of men in more well-paid disciplines, plaintiffs also conducted multiple regression analyses of salary (Pl. Ex. 1, pp 7-8). In these studies, variables representing education, experience, and discipline were used to determine how well they actually predicted salary in the Oregon system.[2] These studies showed approximately a ten percent difference in the salaries paid men and women even when these men and women had the same

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[2]The "predictor" variables used in plaintiffs' studies to represent education, experience and discipline were: 1) highest degree, 2) whether degree was obtained after hire, 3) years since receipt of highest degree, 4) years of service to the institution, 5) age at time of hire, 6) discipline. Variables 7) ethnicity, and 8) citizenship were in the data base and were not removed but did not have a significant impact. (Pl. Ex. 1, p. 7-8). Plaintiffs did not include rank since it is under the control of the institution and not an independent variable. (Pl. ex. 2782, p. 16).

the same education and experience and worked within the same discipline (Pl. Ex. 2, Table A11). These differences were highly statistically significant (approximately 12-16 standard deviations) (Pl. Ex. 2, Table A11).[3]

The redefinition of the class on August 10, 1984, eliminated all administrators, research assistants and associates, extension agents, librarians and most instructors (CR 609). New studies showed that the average difference in salaries between men and women within the newly defined class was approximately eight percent; this

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[3]Statistical significance is a way of determining mathematically the point at which it is likely that the observed differences are not due to chance variation, but result from true underlying disparities. Plaintiffs used and the District Court accepted two or more standard deviations as a definition of statistical significance. (Cr. 716, p. 422).

difference, still statistically significant (11 standard deviations), represented an approximate $2,000 annual difference in pay for a nine month salary of $25,000 (Pl. Ex. 2782, Table 2, p. 26).

b. Rank and Tenure.

(i) Cross-tabulation studies of rank and tenure.

Plaintiffs' study on rank and tenure status demonstrated a statistically significant difference between men and women, with the women clustered in the lower ranks and in fixed term appointments (Pl. Ex. 1, Tables 22-84; 104-166).

(ii) Linear discriminant function classification analysis of rank and tenure.

This cumbersome term defines a study which used the salary analysis variables to predict what the rank and tenure

status of each woman would be if she were placed according to her qualifications in the same way that the men were placed (Pl. Ex. 1, p. 15). There were forty-four percent fewer women full professors and about forty percent more women instructors than their qualifications would suggest. (Pl. Ex. 1, Figure 3). Similarly, there were fifteen percent fewer tenured women and about eight percent more women on fixed term appointments than were predicted (Pl. Ex. 1, Figure 6). Again, the results were highly statistically significant for both rank and tenure.

(iii). Ordered logistic regression analysis of rank and tenure.

In summary, these studies on the newly defined class showed the odds of a woman being in the lowest rank, that of instructor, rather than higher, are two

and one-half times that of a man with the same qualifications (Pl. Ex. 2782, p. 30, corrected [RT 22480]). The odds of being an assistant professor, rather than higher, were over two times the odds of her male counterpart. (Pl. Ex. 2782, p. 30, corrected [RT 22849]). The odds of being an associate rather than a full professor were over three times those of a man (Pl. Ex. 2782, p. 30, corrected [RT 22480]), differences which were once again statistically significant (3.7-4.9 standard deviations) (Pl. Ex. 2782-C, Table 4, corrected).

3. **All of defendant's statistical evidence showed unexplained disparities.**

a. Salary studies.

Salary regression analysis results were reported for each institution and year separately; results, however, were not aggregated over the entire state

system even though the class as certified was for the entire state system.[4] (D. Ex. 8186, Tables 24-33). Failure to aggregate means smaller samples, and this tends to produce smaller standard deviations. (Pl. ex. 2782, p. 121) Defendant added the variable of rank, a variable which is not independent of university control, claiming that rank is an unbiased measure of productivity. (D. ex. 8186, p. 34)[5] Still, of the fifty-nine sex coefficients (wage gaps) reported, fifty-three were negative (disfavor women) and nineteen of them

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[4] Defendant had earlier unsuccessfully argued that a separate class was preferable for each institution.

[5] The actual predictor variables used were degree, years at institution, years since receipt of degree and whether degree was received after hire, all differentiated by whether the degree was "terminal" or not; rank, time in rank, and discipline (D. Ex. 8186, p. 27).

were statistically significant at the 2-standard deviation level. The negative coefficients generally fell in the two percent to five percent range.

Where significant disparities were found, defendant repeated its analysis, first removing all faculty members who were two standard deviations above or below the regression line (about five percent of the faculty) (D. Ex. 8186, Tables 34-39). These persons excluded from the analysis were called "outliers," and included mostly high paid men and low paid women. (Pl. Ex. 2782, pp. 117-118) Still, all nineteen of the sex coefficients resulting from those reduced data sets remained negative and twelve remained significant at the two-standard deviation level (D. Ex. 8186, Tables 34-40A).

Salary regression studies were also

presented for each department in the system having faculty of both sexes. The specific coefficients themselves were not reported, only whether they were negative or positive. Approximately two-thirds of the coefficients were negative (D. Ex. 8186, Table 41).

b. Cross-tabulation studies of tenure.

Defendant presented a cross-tabulation, by sex, of tenure decisions from 1978 to 1982 for each institution (D. Ex. 8186, Table 3; RT 22733). These tables, considered together, showed that tenure was denied to twenty percent of the men and twenty-five percent of the women who requested it. The tenure status of new hires from 1978 to 1983 was cross-tabulated by sex and institution, and showed that twenty-four percent of men and twelve percent of the women were

placed in tenure track rather than in fixed term positions (D. Ex. 8186, Table 4).

c. Promotion studies.

Defendant also introduced studies which showed, by sex, the number and outcome of requests for promotion to full, associate and assistant professor from 1978 to 1982 for each institution (D. Ex. 8186, Table 9, 12-14). The studies reflect that the men were more successful in becoming full professors and associate professors while the women were more likely to become assistant professors. The women spent more years in rank.

d. Current rank studies.

Comparisons were presented for instructor versus higher rank for persons without "terminal" degrees and for assistant professor versus higher ranks

for persons with "terminal" degrees (D. Ex. 8186, Tables 60m 61). All five of the coefficients reported were negative, and two bordered on significance at the 2-standard deviation level. Defendant studied but did not include in its report the comparison between associate professor and full professor which showed statistically significant differences favoring men (RT 23227-23242; 23255-23259).

4. Common pattern in statistical studies.

Plaintiffs' and defendant's studies differed in precise results, primarily because of defendant's failure to aggregate over the entire class and defendant's use of rank as a predictor variable for salary. The studies done by both parties, however, demonstrated disparities in pay, rank, and tenure

status between men and women of the same education, experience, and discipline. Neither party studied quality of teaching, scholarship, and service. The data necessary for such a study was non-existent.

5. In summary, plaintiffs' non-statistical evidence showed the ultimate control of the Board over the institutions, the predominance of male administrators in the Oregon system, the presence of sexist attitudes among Board members and administrators, disregard of affirmative action goals, and unequal treatment of women.

Twenty-two plaintiffs and sixty-eight other individuals, mostly class members, testified on behalf of plaintiffs. The exhibits were numerous and among other evidence, were the depositions of the present and former chancellor, two Board members, eight institution presidents and seven affirmative action officers.

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6. Defendant offered a variety of explanations for the disparities.

Witnesses for the Board presented potential explanations for the disparity in pay, rank, and tenure status between individual plaintiffs or class members and their male comparators. These included budget (RT 13331), failure to negotiate harder (RT 13331), longevity (RT 14421-23), market conditions (RT 21822), lesser teaching ability (RT 13034), less research (D. Ex. 8099), less institutional or community service (Pl. Ex. 2694), lesser demand for specialty (RT 17815), inflation (RT 11641), and lack of money (RT 12375).

Other representative explanations were that the woman received her education within the Oregon system (RT 4113-14), she knew of the lesser pay or status when she accepted the position (RT

19708), her program was not needed (RT 13090), she was not "laid back" enough (RT 6359), she was too "quiet" (Pl. Ex. 2003M); or, finally, the dean was too swamped to consider the equity raise (RT 2654).

7. **The District Court opinion.**

The 487 page District Court Opinion separately analyzed the twenty-two individual cases without reference to any other evidence in the case and found intentional discrimination in three cases. Although the District Court indicated that it considered all the evidence in the case, nowhere in its 487 page Opinion did it discuss the testimony of the sixty-eight additional class members or other witnesses who testified about individual acts of discrimination and discriminatory attitudes. In fact, the court stated that it "need not

address" this evidence (CR 716, p. 487).

The District Court, after excluding plaintiffs' rebuttal statistical experts, found defendant's statistical experts more credible. (CR 716, p. 374-375). Although plaintiffs survived the Rule 41 Motion to Dismiss, the District Court found numerous flaws in plaintiffs' proof, especially that plaintiffs failed to compare statistically the quality of teaching, scholarship, and service of men and women faculty members. (Cr. 716, p. 385-387) Nor did defendant study these quality factors. No data existed, however, for such comparison. The class case was dismissed.

8. **The Ninth Circuit Opinion.**

The eight page opinion of the Ninth Circuit states, "There is no substantial dispute that historical disparity exists," 816 F.2d at 461, and that the

"statistics may have proved that there were disparities in salaries and other terms of employment, but not that they were the product of disparate treatment." 816 F.2d at 468. The court added, "We can conceive of no useful purpose in detailed rehearsal of the evidence." 816 F.2d at 461. None of the statistical evidence is discussed in the short Ninth Circuit opinion. The court did, however, affirm the District Court's conclusion that the plaintiffs could not prevail without accounting statistically for quality of teaching, scholarship, and service. 816 F.2d at 465. In a footnote, the Ninth Circuit says that the District Court had a "possibly erroneous belief" that faculty rank was "an objective piece of data" and thus could legitimately be used to explain a disparity, but concluded that this "does not appear to

have affected the outcome of the trial." 816 F.2d at 465 n. 2.

The Ninth Circuit found that the District Court's rejection of plaintiffs' statistical case was not clearly erroneous and held the protested trial rulings were not an abuse of discretion.

REASONS FOR GRANTING THE WRIT.

I.

Introduction

The decision of the Ninth Circuit is in fundamental conflict with four major cases of this court that analyze Title VII of the Civil Rights Act: Teamsters, 431 U.S. 324 (1977), Burdine, 450 U.S. 248 (1981), Aikens, 460 U.S. 711 (1983) and Bazemore, 106 S. Ct. 3000 (1986).

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II.

After recognizing "historical disparity" in the pay, promotion and tenure of women and men faculty, the Ninth Circuit failed to follow Bazemore by concluding that there was no violation of Title VII unless defendant intentionally failed to remedy the disparity.

When Congress included higher education within Title VII of the Civil Rights Act in 1972, it made this finding:

> "Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . . When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. H.R. Rep. No. 238, 92d Cong. 2d Sess. (1971), reprinted in (1972) U.S. Code Cong. & Admin. News 2137, 2155. (Excerpted in the Appendix hereto, Volume I, p. 77 - 78.

The reason why Congress passed the 1972 amendments can also be found in the uncontradicted evidence in this case

through the testimony of Dr. Mary Francis Berry, who was the Assistant Secretary of Education (RT 6717-22).

In this case, the decision of the Ninth Circuit, which recognizes this historic disparity, again raises the issue of whether there is a legal duty to correct preexisting discrimination. This issue has been decided in Bazemore and the Ninth Circuit fails to follow the decision of this Court.

The pay difference shown by plaintiff's statistical proof, even after removing the non-regular teaching faculty, was about $2,000 per year in favor of men throughout all institutions in the Oregon state system and in all of the six years studied, with statistically significant standard deviations system wide of 8.81 to 11.94 (Pl. ex. 2782, p. 26). The defendant's figures, even after

including tainted subjective variables such as rank and removing "outliers", shows a standard deviation of 5.22 (Pl. ex. 2782, p. 132), or about $700 per year when aggregated system wide. A standard deviation of five means that the probability of the pay differential occurring by chance is about one in a hundred million.[6]

The Ninth Circuit recognizes this "historical disparity" at the start of its opinion, but then states:

> "[The District] Court found that, at worst, the state's efforts to bring its female employees into parity with its male employees has been impeded more by external economic factors than by lack of effort

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[6] By way of comparison, the pay differential which proved discrimination in Bazemore using similar objective variables, was $331 per year, 106 S.Ct. at 3008, with much smaller standard deviations than found in this case. Bazemore v. Friday, 751 F.2d 662, 672-673 (4th Cir. 1984).

by the board to redress historic imbalances." 816 F.2d. at 461.

Again at the end of the opinion, the Ninth Circuit concedes that "the statistics may have proved that there were disparities in salaries and other terms of employment, but not that they were the product of disparate treatment." 816 F.2d at 468. (emphasis added) In other words, the court indicates that intentionally failing to correct the proved disparity between equally qualified men and women is not legally wrong if there is no motive to do wrong. The legal issue, then, is whether "external economic factors" or other similar rationalizations can legally excuse the Board, with its budget of over a billion dollars for each biennium (RT. 8415-8416) from correcting the historic disparity. The answer is found in

Bazemore v. Friday, supra, where this court states,

> "Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. . . . Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII regardless of the fact that this pattern was begun prior to the effective date of Title VII . . ." (emphasis added) 106 S. Ct. at 3008.[7]

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[7]The First Circuit also disagrees with the Ninth Circuit in an academic case:

"Similarly, a decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights." Lamphere v. Brown Univ., 685 F. 2d 743, 747 (1st Cir. 1982).

In Trout v. Lehman, 517 F. Supp. 873, (D.D.C. 1981), aff'd in part, rev'd in part, 702 F.2d 1094 (D.C. Cir. 1983), vacated 465 U.S. 1056 (1984), the

In the present case, there was no correcting of the disparities between men and women faculty over the six academic years studied, 1977-1978 through 1982-1983. (Pl. ex. 2782, Table 3).

A pay disparity between equally qualified women and men faculty that is not corrected is legally wrong, even when it is "historic". If this were not so, civil rights laws would be ineffective to cause change. The Ninth Circuit decision contradicts this Court's unanimous opinion in Bazemore.

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District Court relied upon Bazemore, in rejecting the defense of historical disparity. (652 F. Supp. 144 (D.D.C. 1986).

III.

The Ninth Circuit failed to follow Teamsters, Burdine, Aikens, and Bazemore by concluding that defendant has no burden to provide evidence of the reason for the proven disparity.

After plaintiffs have proved a prima facie case of disparity, historic or otherwise, then defendant has a burden of explanation through evidence. This court has phrased that burden in different ways. In Teamsters v. U.S., 431 U.S. 324, 360 (1977), this court stated that defendant must introduce evidence "to defeat the prima facie showing of a pattern or practice by demonstrating that [plaintiff's] proof is either inaccurate or insignificant."

In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981), this Court said that ... "the defendant must clearly set forth, through the introduction of admissable evidence, the

reasons for the plaintiff's rejection" (or, in this case, the reasons for the disparity in pay, promotion, and tenure).

The burden was described in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-715 (1983) by stating:

> "In other words, the defendant must 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason'. Id. (Burdine at 254).
>
> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case' and 'the factual inquiry proceeds to a new level of specificity." (emphasis added).

In Bazemore v. Friday, this Court

shortens this language by saying that defendants "have responded to the plaintiffs' proof by offering evidence of their own," yet clearly this does not suggest any lesser burden for defendant. 106 S. Ct. at 3008. Indeed, this Court in Bazemore criticized the employer's failure to come forward with an explanation by pointing out that:

> "There was very little evidence to show there was in fact no disparity in salary between blacks and whites, or to demonstrate that any disparities that existed were the product of chance. . . . Respondents' strategy at trial was to declare simply that many factors go into making up an individual's salary; they made no attempt that we are aware of - statistical or otherwise - to demonstrate that when these factors were properly organized and accounted for, there was no significant disparity between the salaries of blacks and whites." 106 S. Ct. at 3010 n. 14.

This quoted language from Bazemore,

requiring defendant to show that there was no pay disparity, is an even stricter phrasing of defendant's duty than the language of the previous cases.

In contrast, the Ninth Circuit in the present case quotes Bazemore, and then follows with this sentence:

> "The only relevant burden in a class action disparate treatment case, assuming that plaintiffs can avoid Rule 41 dismissal, is upon plaintiffs to prove the existence of discriminatory intent." 816 F.2d at 461.

Plaintiffs contend a correct statement of the law would be:

> The only relevant burden in a class action disparate treatment case, assuming that plaintiffs can avoid Rule 41 dismissal, and defendant responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, is upon plaintiffs to prove the existence of discriminatory intent (emphasis added).

The Ninth Circuit's statement is not

careless writing. Not only does it not require any burden for the defendant; it also maintains that an error in the allocation of burdens is not reviewable.

> "Indeed, by the time a fully-tried class action disparate treatment case reaches appeal, we need not consider whether the parties carried their respective burdens at the appropriate stages unless prejudicial errors, infecting distinct legal rulings prevented a fair trial." 816 F.2d at 46.

The opinion then erroneously cites Aikens. That case, however, does not support the proposition which denies appellate review of a legal error of the District Court.[8]

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[8]The Ninth Circuit in this case, 816 F.2d at 461, miscites another Ninth Circuit case, Rios v. Board of Regents of the University of Arizona, 811 F.2d 1248, 1249 (9th Cir. 1987). Rios follows Teamsters, Burdine, Aikens, and Bazemore in holding that the presumption of discrimination drops out of the case after defendant has provided evidence of the reason for the disparity. Rios says

The statistical evidence introduced by defendant in this case showed disparity favoring men. Defendant introduced no statistical evidence supporting its claimed major reason for the disparity - quality of teaching, scholarship, and service. Therefore, defendant did not meet its burden as a matter of law.

The McDonnell-Burdine presumption drops out of the case at the stage after defendant has carried its burden of introducing evidence which provides the reason for the disparity.[9] Therefore,

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nothing supporting the view that a legal error misunderstanding the burdens of the parties is never reviewable.

[9] In contrast, the First Circuit, in a recent opinion, recognizes that the defendant has a burden of explanation both where plaintiff has direct proof that discrimination was the motivating factor in defendant's decision and where plaintiff has only proved unexplained disparities. Fields v. Clark Univ., 817

eliminating the presumption and the defendant's evidentiary burden entirely, the Ninth Circuit's decision flies in the face of a decade of Supreme Court opinions including opinions by Justice Stewart (Teamsters), Justice Powell (Burdine), Chief Justice Rehnquist (Aikens), and Justice Brennan (Bazemore).

It is hornbook law that if a presumption operates in plaintiff's favor, then defendant must do something to overcome the presumption. Burdine, 450 U.S. at 255 n. 8. Unless this case is reversed, there will be no such burden upon future defendants in the western states. As this court has pointed out in Transworld Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985), "The shifting burdens of proof set forth in McDonnell-

F. 2d 931, (1st Cir. 1987).

Douglas are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence."

In addition to being contrary to the decisions of this court, defendant having no burden what so ever, also places a nearly impossible burden upon plaintiffs.

Unquestionably, it is difficult to prove the intent to discriminate. Therefore, this court has repeatedly required that defendants not only provide the reason for the disparity, but also support it by evidence. Only then can plaintiffs help the court evaluate whether the given reason is a pretext. But if a defendant can prevail by saying nothing more than its intentions were pure, civil rights plaintiffs have nearly an impossible disadvantage.

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IV.

The Ninth Circuit failed to follow Bazemore by not recognizing that a statistical analysis of less than all measurable variables may serve to prove plaintiffs' case.

The Ninth Circuit opinion tells us that neither side's statistical evidence accurately reflected the complex factors and motivations guiding the Board's employment, salary, and advancement decisions, and therefore the plaintiffs' claim must fail, ever though a prima facie case was established. Statisticians on both sides accounted for the objective variables of education, experience, and discipline, variables which are independent of the control of the institution, and both plaintiffs' and defendant's statisticians found disparity in favor of men. The Ninth Circuit opinion specifically recognizes that statistics may have proved this

disparity. Variables presented in this case are remarkably similar to those used by the Bazemore plaintiffs ("race, education, tenure, and job title") 106 S. Ct. at 3008.

The Ninth Circuit lists the types of rebuttal statistical evidence that this court has expected of defendants in past cases. 816 F.2d at 464. But then the court seeks to break what it apparently believes is new ground by incorrectly relying on a law review article about statistical "goodness of fit."[10] Id.

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[10] T.J. Campbell, 'Regression Analysis in Title VII cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 Stan. L. Rev 1299, 1305-1322 (1984).

This article argues that a proper regression model must have goodness of fit, which is the statistical concept of R^2, and urges that a R^2 percentage of 50 percent must exist for the study to have validity Id. at 1311. The R^2 found in plaintiffs' multiple regression analysis for all eight institutions over the six

Thus, the Ninth Circuit concludes that plaintiffs' regression could not have a proper goodness of fit because it did not measure "actual decision making" and that this is so since higher education bases its decisions upon such subjective variables as quality of teaching, scholarship and service. It erroneously concludes that a statistical analysis which fails to account for these variables cannot prevail.

a. In this case, there is no data for a statistical evaluation of these variables.

In the present case, the Board maintained no systematic records evaluating these variables and they could not be retroactively created back to 1978 for thousands of faculty members to allow

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years studied averaged 66 percent and the median R^2 was 68.6 percent. (P. ex. 2782, Table 1) Plaintiffs' analysis met Campbell's test.

either side to analyze them statistically. The defendant, despite its speculation that these factors are crucial, has no evidence that quality of teaching, scholarship and service are the reason for the disparity, nor, for that matter, any proof that women are inferior in those categories. Defendant's expert so conceded during the trial (RT 22989). The decisions in Teamsters, Burdine, Aikens, and Bazemore, supra, however, require that defendant provide such evidence of the claimed reason for the disparity in order to meet its burden. Since defendant has not done so, the presumption of discrimination remains in the case. The Ninth Circuit decision, unless reversed, will allow future class defendants to avoid liability by providing no evaluations and maintaining no records!

Plaintiffs have proven historical disparity by using objective variables found in defendant's data base. Comparing women and men faculty members with equal education, experience, and discipline results in an approximately $2,000 per year pay disparity in favor of the men. When defendant and the Ninth Circuit point to these unrecorded, subjective productivity factors as possible explanations of this disparity, this is no more than a speculation that women might be inferior to men as teachers and scholars. This is precisely the same kind of speculation which this Court in Neal v. Delaware, 103 U.S. 370 (1880), rejected by attacking the "violent presumption" that "the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity to sit on

juries." 103 U.S. at 397.

The District Court required that, "In order to prevail, plaintiffs must prove then, even after all relevant qualifications are taken into account, there still remains a [statistically significant] difference." (CR 716, pp. 379-380). (emphasis added) This is further explained by the District Court when it said, "In order to prevail, plaintiffs must present statistical evidence that models the decision making process under study." (CR 716, pp. 380). (emphasis added) This standard requires proving discrimination with scientific certainty. The Ninth Circuit decision affirmed this requirement.

But this "decision making process" is not measurable in this case because there are no systematic evaluations and no records that can be quantified

statistically.

This identical legal error was the basis for the reversal in Bazemore, where this Court said,

> "Importantly, it is clear that a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence." 106 S. Ct. at 3009. (emphasis added)[11]

The Ninth Circuit contradicts

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[11] Based upon the Bazemore decision, the Second Circuit reversed and remanded an academic case in which the District Court required too much of the statistical proof. Sobel v. Yeshiva University, 797 F.2d 1478 (2d Cir. 1986). The District Court on remand, maintained its view of the evidence, but recognized that plaintiff need not account for all measurable variables. Sobel v. Yeshiva, 656 F. Supp. 587 (S.D.N.Y. 1987).

Bazemore by requiring plaintiffs to account for unmeasurable variables.

b. Even if such data existed, these variables are inherently biased.

The variables of quality of teaching, scholarship, and service, however, are inherently biased. It makes no legal difference if the predominantly male administrators who paid the women less money rationalized their decisions upon a subjective feeling that the women are perhaps inferior teachers and scholars. If the decision is discriminatory, so is the rationale. It is for these reasons that P. Baldus and J. Cole question the use of such variables:

> "An important consideration in determining the suitability of a qualification variable is the likelihood that it will reflect the very bias that the quantitative analysis is seeking to detect. For example, if efficiency reports

> for workers in an employer's plant are prepared by socially biased supervisors, then one would expect those evaluations to explain statistically the disparities observed in a socially discriminatory salary structure, i.e., workers with good efficiency reports (the whites) are paid better than workers with poor efficiency reports (the blacks). The inclusion of such a variable in a model of the selection process issue would clearly invalidate the results and should therefore be entirely excluded." P. Baldus and J. Cole, Statistical Proof of Discrimination 204 (1980).

This criticism would apply even if the subjective variables had been evaluated.

The District of Columbia Circuit has held that plaintiffs need not account for subjective, unquantifiable variables. Segar v. Smith, 738 F.2d 1249, 1276, (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).[12]

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[12]The subjective variable in Segar was "specialized experience," which was defined in the applicable civil service

Requiring plaintiffs to use variables that are not measurable in the Oregon State System of Higher Education contradicts Bazemore. Even if they were measurable, the requirement to use these inherently biased variables violates good statistical technique.

IV.

The Ninth Circuit failed to follow Teamsters and Burdine by denying plaintiffs a full and fair opportunity to demonstrate pretext.

The District Court excluded the testimony of plaintiffs' rebuttal experts, Stanford Professors Dr. Kenneth Arrow, Nobel Laureate in Economics and president of the International Economic Association, and Dr. Ingram Olkin, president of the Institute of

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regulations as including "such intangibles as 'ingenuity,' 'resourcefulness,' 'ability to arrive at sound conclusions,' 'tact,' and discretion. 738 F.2d at 1276.

Mathematical Statistics (CR 604, 638, RT 19256, CR 643, CR 649, RT 21512-21515, CR 651m 652, 668); and then decided the case, based in part on the presumed credibility of defendant's experts (CR 716, p. 372, 375). The court said the plaintiffs' original experts were less credible because they were biased, but it would be difficult to accuse Dr. Arrow and Dr. Olkin of being biased.

The district court then required plaintiffs to present most of their rebuttal case, including statistical experts, before completion of defendant's answering case to which the rebuttal was directed (CR 638, 644a, 649b, 670-673, 679a, 681, 681a, 682c, 682d); required plaintiffs to rebut four and a half months of answering testimony in eight days (CR 651; CR 668; RT 21734); changed the class definition over six months into

trial, attempted to clarify it over another month, and then gave plaintiffs an impossibly short three weeks to redo their statistics on the new class (which was never adequately defined) (CR 609, 610, 612; RT 16627-28, 16639, 16698-16704; CR 629; RT 19503). When plaintiffs could not make these last minute deadlines, the District Court excluded part of plaintiffs' newly calculated statistics (the tenure studies) and plaintiffs' internationally known rebuttal statisticians as a sanction. The District Court was anxious to complete this case in order to prepare for another trial. 816 F.2d at 466.

The Ninth Circuit surprisingly found no abuse of discretion.

Since the Ninth Circuit erred by never placing any rebuttal burden upon defendant, it may not have understood the

legal importance of plaintiffs' rebuttal case. The Burdine decision makes clear that plaintiffs must be afforded a full and fair opportunity to demonstrate pretext. Burdine, 450 U.S. at 258. These plaintiffs never had that opportunity.

The denial of a fair trial in ways similar to the conduct of the District Court in this case have caused the Ninth Circuit itself and other circuits to grant new trials.

In Young and Simon, Inc. v. Merritt Savings and Loan, Inc., 672 F.2d 401, 403 (4th Cir. 1981), a reversal was required where prejudice from the combined action of the trial judge was "clearly within the range of possibility," obviously not the test applied by the Ninth Circuit.

The Third Circuit has held that it is an abuse of the trial court's

discretion to exclude the testimony of important witnesses. Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 905 (3d Cir. 1977). No witnesses could have been more important than internationally known experts such as Dr. Arrow and Dr. Olkin.

Indeed, in connection with the exclusion of Dr. Arrow and Dr. Olkin, the Ninth Circuit found,

> "Obviously, there was a misunderstanding on the part of plaintiffs' counsel. However, as the court noted, he failed to 'memorialize' his understanding. Technically, he violated the court's scheduling orders" (emphasis added) 816 F.2d at 466.

In the case of Potlatch Corp. v. U.S., 619 F.2d 153, 157 (9th Cir. 1982), another panel of the Ninth Circuit held that it was an error to exclude a party's only independent experts. Thus, the District Court's decision to exclude

plaintiffs' rebuttal experts based upon a misunderstanding and technical violation was an abuse of discretion and denied plaintiffs a fair trial.

In Molever v. Levenson, 539 F.2d 996, 1005 (4th Cir. 1976) cert. denied, 429 U.S. 1024 (1976), the court held that the trial judge's curtailment of the trial was an error which required reversal of the verdict. The eight days allowed to plaintiffs in the present case was not a full and fair opportunity to rebut four months of defendant's testimony.

V.

The Ninth Circuit violated the intent of Congress by not holding academic employers to the same standard as other employers.

Institutions of higher learning have sometimes been clothed with a mystique by the courts. Considerable subjectivity

enters into the evaluation of the performance of members of a college faculty. For this reason, these institutions were not included in the Civil Rights Act of 1964. But they were added in 1972, after a finding by Congress that discrimination was present in these ivy-covered halls just as it was elsewhere. H.R. Rep. No. 238, 92d Cong. 2d Sess (1971), supra.

The District Court opinion in this case gave deference to the academic decision makers:

> "Ordinarily, the subjective nature of employment decision-making in most employment situations requires a higher level of judicial scrutiny. However, in academic and professional employment situations, courts should be reluctant to second-guess subjective decisions made by employers or to impose the court's evaluation of the quality or merit of academic and professional employees on defendants." (CR 716, p. 387).

In affirming, the Ninth Circuit also treated academic decision makers differently:

> "This concern [for goodness of fit in statistical models] is particularly important where courts examine academic and professional employment and advancement decisions." 816 F.2d at 464.

Both District and Circuit courts then based their decision upon plaintiffs' inability to model academic decision making statistically.

In Hishon v. King & Spaulding, 467 U.S. 69 (1984), this Court holds that a law firm could not discriminate against a woman lawyer associate in deciding advancement to partnership. In Hishon, Justice Powell, concurring, states:

> "With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of

> association. For example, the Court of Appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions. Lieberman v. Gant, 630 F.2d 60, 67-68 (CA2 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 547-548 (CA3 1980). CF. University of California Regents v. Bakke, 438 U.S. 265, 311-315 (1978) (opinion of Justice Powell).
>
> "The present case, before us on a motion to dismiss for lack of subject matter jurisdiction, does not present such an issue." (467 U.S. at 80-81, no. 4)

The issue of whether deference to academic decision making is lawful has, therefore, never been directly confronted by this Court, although it has troubled the circuit courts for years.

In Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir. 1978), the court found a non-discriminatory termination of

a woman professor, but wrote:

> "The pervasive nature of discriminatory university employment practices has been well documented in the literature, and was characterized in the Congressional debates preceding the passage of the 1972 amendments as 'truly appalling,' 'gross' and 'blatant.'
>
> "It is clear beyond cavil, then, that the Congress has evidenced particular concern for the problem of employment bias in an academic setting. Indeed it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias."

Similar concerns are expressed by the First Circuit in Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 175-176 (1st Cir. 1978), vacated on other grounds, 439 U.S. 24 (1978), appeal after remand, 604 F.2d 106 (1st Cir. 1979); and the Third Circuit in Kunda v. Muhlenberg College, 621 F.2d 532, 547 (3d

Cir. 1980).

In Namenwirth v. University of Wisconsin System, 769 F.2d 1235, 1245 (7th Cir. 1985), cert. denied, 106 S. Ct. 807 (1986), the majority opinion highlights the issue:

> "But to say all that is only to face up to the problem. The problem remains: faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars. The courts have struggled with the problem since Title VII was extended to the university, and have found no solution. Because of the way we have described the problem - the decision-maker is also the source of the qualifications- there may be no solution; winning the esteem of one's colleagues is just an essential part of securing tenure. And that seems to mean that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose."

A dissenting opinion of Senior

Circuit Judge Swygert responds,

> "While I commend the majority for its frankness, I dissent from its defeatism. The notion that tenure decisions must be accorded special deference was put to rest in 1972, when Congress expressing concern about widespread discrimination against women in academia, removed academia's exemption from Title VII scrutiny." (769 F.2d at 1244).

Despite the clear expression of congressional intent, most cases that have mentioned deference to academic decision making, especially involving tenure, have ruled against the women or minority plaintiffs. Indeed, courts have deferred more to subjective decision making in white collar jobs than in blue collar jobs. Barthelot, Application of Title VII to Jobs in High Places, 95 Harv.L.Rev. 945, 973-78 (1982).

This Court has never considered whether Title VII applies to academia in

a way different from other employment relationships. For fifteen years, higher education has been subject to Title VII. This case is the proper vehicle for such a review.[13]

CONCLUSION

The Ninth Circuit fails to follow the unanimous decision of this Court in Bazemore, as well as Teamsters, Burdine,

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[13] Additional Circuit court cases in which deference to academic decision making has been discussed include: Ford v. Nicks, 741 F.2d 858, 864 (6th Cir. 1984); Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984); Kumar v. Univ. of Massachusetts, 774 F. 2d 1, 11 (1st Cir. 1985); cert denied, 106 S.Ct. 1496 (1985); Merrill v. Southern Methodist Univ., 806 F.2d 600, 606 (5th Cir. 1986); Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979); Molthan v. Temple Univ., 778 F.2d 955, 962 (3d Cir. 1985); Keyes v. Lenors Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977); cert denied, 434 U.S. 904 (1977); Green v. Texas Tech Univ., 474 F.2d 594 (5th Cir. 1973); Faro v. New York Univ., 502 F.2d 1229, 1231-2 (2d Cir. 1974); Smith v. Univ. of North Carolina, 632 F.2d 316 (4th Cir. 1980); Craik v. Minnesota State Univ., 731 F.2d 532 (3rd Cir. 1980).

and Aikens, supra. The Court holds that historical disparity can excuse present disparity; that defendant has no burden of providing evidence of the reason for the disparity; and that plaintiffs, in order to prevail, must account for unmeasurable variables. In addition, it denies an adequate opportunity to demonstrate pretext, as required by Burdine, supra.

When the Ninth Circuit says that the decision making of academic employers is entitled to special deference, it is contrary to the intent of the 1972 amendments to Title VII, and raises an issue upon which the circuits differ and this Court has never spoken.

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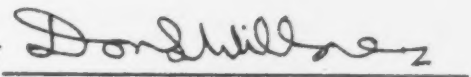
The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLNER & KELLY

BY 

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1. Penk, et al v. Oregon State Bd. of Higher Education, 816 F.2d 458 (9th Cir. 1987).

Anna PENK, Elaine Spencer, Bernice Gilmore, Madronna Holden, Betty Leonard, Lois Schreiner, G. Joanne Amspoker, Margaret Lumpkin, and all others similarly situated,

Plaintiffs-Appellants,

vs.

OREGON STATE BOARD OF HIGHER EDUCATION,

Defendant-Appellee.

No. 85-3792.

United States Court of Appeals, Ninth Circuit

Argued and Submitted, September 5, 1986. Decided April 29, 1987.

Don S. Willner and Barrie J. Herbold, Portland, Or., for plaintiffs-appellants.

Virginia L. Linder and James S. Mountain, Jr., Salem, Or., and James J. Casby, Jr., Eugene, Or., for defendant-appellee.

Jacqueline W. Mintz and Douglas S. McDowell, Washington, D.C., for the

amicus curiae.

Appeal from the United States District Court for the District of Oregon.

Before EUGENE A. WRIGHT, GOODWIN and NELSON, Circuit Judges.

GOODWIN, Circuit Judge:

After nine months of trial in which were examined 58 individual claims of sex discrimination in salary, promotion, and tenure practices by the Oregon state system of higher education, the court granted individual relief in three claims, but found against the class plaintiffs and denied all other claims against the state board of higher education. The plaintiffs appeal as a class, and individually. We affirm.

Twenty-two women faculty members sued the defendant board under 42 U.S.C. Sections 2000e et. seq and 28 U.S.C. Section 1983. The Title VII claims were

tried. The Section 1983 claims were dismissed during pretrial proceedings. The case proceeded as a "pattern and practice" disparate treatment case, comparing the board's treatment of women faculty and male faculty in terms of rank, pay, promotion, tenure and administrative appointments. Statistical evidence played a major part in the trial.

The trial judge prepared a 487 page memorandum addressing the factual and legal issues. Within a document of that size, disappointed litigants are likely to find a number of points with which to disagree. This case is no exception.

The plaintiffs' failures of proof were not for want of effort. The trial produced 25,000 pages of testimony and rooms full of exhibits. The subject matter ranged over the history of women

in academic callings. The court heard about the economics of supply and demand, and the depressing effect of tenured, high salaried senior faculty, who are frequently older males, upon the salaries of junior faculty, who are frequently females, during times of taxpayer parsimony and shrinking budgets.

After the parties rested, the court determined that the state system of higher education had not intentionally discriminated against women. There is no substantial dispute that historical disparity existed. However, historical disparity does not give rise to a successful Title VII claim. The court found that, at worst, the state's efforts to bring its female employees into parity with its male employees had been impeded more by external economic factors than by lack of effort by the board to redress

historic imbalances.

Because we are satisfied that the trial court's findings of fact are not subject to reversal as clearly erroneous under Fed. R. Civ. P. 52(a), see Anderson v. City of Bessemer, 470 U.S. 564, 573-75, 105 S. Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985), and because we can conceive of no useful purpose in detailed rehearsal of the evidence, we will take up as briefly as possible the principal legal questions presented by the appeal.

I. BURDENS OF PROOF, PERSUASION AND PRODUCTION

[1] Plaintiffs assert that the court erred in allocating and applying the respective burdens in the class case. They contend that the court required too much of them and too little of the board. In essence, their contention is that the court erroneously neglected to adhere

strictly to the standards for the order and allocation of proofs set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). However, the McDonnell Douglas tripartite standard does not inflexibly apply to class action disparate treatment cases. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481, 75 L.Ed.2d 403 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6, 101 S. Ct. 1089, 1094 n. 6, 67 L.Ed.2d 207 (1981); Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 538 (9th Cir. 1982); B. Schlei & P. Grossman, Employment Discrimination Law 244 (2d ed. Supp. 1985).

Indeed, by the time a fully-tried class action disparate treatment case reaches appeal, we need not consider

whether the parties carried their respective burdens at the appropriate stages unless prejudicial errors, infecting distinct legal rulings, prevented a fair trial. Aikens, 460 U.S. at 715, 103 S. Ct. at 1481; Rios v. The Board of Regents of the University of Arizona, 811 F.2d 1248, 1249 (9th Cir. 1987); Benzies v. Illinois Dep't. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987); Gottlieb v. Tulane University of Louisiana, 809 F.2d 278 (5th Cir. 1987).

In Bazemore v. Friday, ___ U.S. ___, 106 S. Ct. 3000, 92 L.Ed.2d 315 (1986), a disparate treatment class action case, the Supreme Court responded to plaintiffs' assertion that the McDonnell Douglas order and allocation of proof had not been adhered to as follows:

"[I]f the defendants have not

> succeeded in having a case dismissed on the ground that plaintiffs have failed to establish a prima facie case, and have responded to the plaintiffs' proof by offering evidence of their own, the factfinder must then decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination. . . . This determination is subject to the clearly erroneous standard on appellate review.

106 S. Ct. at 3008 (citations omitted). Thus, the only relevant burden in a class action disparate treatment case, assuming plaintiffs can avoid Rule 41 dismissal, is upon plaintiffs to prove the existence of discriminatory intent.

[2] In this action, at the close of plaintiffs' case-in-chief, the court denied the board's motion for Rule 41 dismissal and allowed the board to

introduce rebuttal evidence challenging plaintiffs' statistical and other evidence. The district court then evaluated the evidence to determine whether plaintiffs had demonstrated, by a preponderance, the existence of either a pattern or practice of discrimination or systematic purposeful discrimination. None was found. We hold that in reaching its decision, the district court placed appropriate burdens on plaintiffs for proof of discriminatory treatment.

II. CONSIDERATION OF ANECDOTAL, STATISTICAL, AND NONSTATISTICAL PROOF AND THEIR INTERRELATIONSHIP

Plaintiffs assert that the judge failed to consider their nonstatistical (or "anecdotal") evidence in the individual and class claims, and that she failed to consider the statistical evidence in the individual cases. Plaintiffs argue that the judge failed to

comprehend the interplay between the statistical evidence and the testimony of individual plaintiffs and other class members.

A. Individual Claims

When summarizing her conclusions on the individual claims, the judge noted that each individual plaintiff provided sufficient testimony to require the board to come forward with legitimate nondiscriminatory reasons for its actions. She then wrote:

> Considering the quality and quantity of the Board's explanations, each plaintiff should have come forward with evidence to show that the reasons offered by the Board were a pretext for sex discrimination. In order to carry their ultimate burden of persuasion, plaintiffs had to show that the Board's explanations were offered to conceal the Board's true purpose of sex discrimination. This portion of the plaintiffs' individual cases was entirely inadequate. Plaintiffs offered

> almost no evidence to impeach the Board's explanations of the allegedly illegal employment conditions. Without rebuttal testimony to establish that the Board's reasons were a pretext for sex discrimination, the named plaintiffs' individual cases, in most instances, had to fail.

While the McDonnell-Douglas scheme is not ritualistic, and while the court was free to decide whether the Board intentionally discriminated against the plaintiffs based upon all of the evidence before it, the case in chief presented by each plaintiff was, for the most part, weak; and the rebuttal cases presented by each plaintiff was, for the most part, nonexistent.

> "In most cases, only the named plaintiffs testified in support of her individual claim, and her testimony rarely did more than describe differences in employment conditions."

The quoted passage indicates that

the court may have viewed each individual case within its own evidentiary compartment. But even if the trier did require evidence of pretext relating specifically to each individual plaintiff, the ultimate result of the proof was a failure to establish pretense.

Generally, there are three types of evidence that can be used to show pretext: (1) direct evidence of discrimination, such as discriminatory statements or admissions, (2) comparative evidence, and (3) statistics. B. Schlei P. Grossman, Employment Discrimination Law 1314 (2d ed. 1983).

[3,4] Plaintiffs strongly attack the judge's reaction to their statistical evidence on the issue of pretext for the individual claims. Statistics may be used to show that a defendant's

articulated nondiscriminatory reason is pretextual. McDonnell-Douglas, 411 U.S. at 805, 93 S. Ct. at 1825; Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1986). However, while statistics are often probative in determining the existence of a pattern or practice of disparate treatment, their usefulness in proving pretext "depend[s] primarily upon their relevance to the specific decision affecting the individual plaintiff, [and not] those that affect plaintiff's protected class in general." Employment Discrimination Law, supra, at 1316.

Proof of general employment policies and practices may be particularly useful in showing pretext. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 880, 104 S. Ct. 2794, 2801, 81 L.Ed.2d 718 (1984); McDonnell Douglas, 411 U.S. at 805, 93 S. Ct. at 1825; Sweat v.

Miller Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) (statistical evidence of employer's general policy and practice concerning minority employment to be considered on remand). In addition, more general comparative evidence may permit a court to fairly draw an inference of pretext. Furnco Construction Corp. v. Waters, 438 U.S. 567, 580, 98 S. Ct. 2943, 2951, 57 L.Ed.2d 957 (1978) (district court entitled to consider the racial mix of the workforce); O'Conner v. Peru State College, 781 F.2d 632, 637 (8th Cir. 1986) (inequities between men's and women's athletic programs considered); Holsey v. Armour & Co., 743 F.2d 199, 208 (4th Cir. 1984) (general atmosphere of discrimination and past practices may be considered), cert. denied, 105 S. Ct. 1395,84 L.Ed.2d 784 (1985).

[5] In this action, the memorandum opinion would have been stronger had it expressly stated, when reviewing the evidence of pretext in the individual cases, that the district judge had reviewed (1) all of the statistical proof, (2) the evidence of sexist attitudes on the part of male administrators and (3) the degrees of compliance with affirmative action policies. It does not follow, however, that there must be a new trial. We think the memorandum opinion indicates that the judge did, in fact, consider the relevant pretext evidence of a statistical and anecdotal nature introduced by plaintiffs. She simply found the evidence unconvincing as proof of pretext.

B. Class Action

[6] In a discriminatory treatment

class action, plaintiffs have the burden of proving by a preponderance of the evidence that sex discrimination was defendant's "standard operating procedure" maintained through systematic intentional discrimination. Bazemore, 106 S. Ct. at 3008; Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875-76, 104 S. Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855, 52 L.Ed.2d 396 (1977); Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S. Ct. 511, 83 L.Ed.2d 401 (1984).

[7] To establish the requisite discriminatory intent, plaintiffs may offer statistical, nonstatistical, and anecdotal evidence. However, even if a district court decides that plaintiffs

have established prima facie evidence of intentional discrimination, for plaintiffs to prevail, the district court must still be persuaded by a preponderance of the evidence that actual actionable discrimination exists. Bazemore, 106 S. Ct. at 3008; Burdine, 450 U.S. at 257, 101 S. Ct. at 1095; Hazelwood School District v. United States, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 2741, 53 L.Ed.2d 768 (1977); Gay, 694 F.2d at 537 n. 4 ("it is clear that the burden which shifts to the defendant upon the establishment of a prima facie case is a burden of production only; the burden of persuasion remains with the plaintiff at all times").

In ruling on the board's motion to dismiss the class action, the judge indicated that she had examined the individual examples of discrimination to

see whether they bolstered plaintiffs' statistical case. In her introduction to the class action findings and conclusions, she explained:

> Plaintiffs' statistical evidence is the foundation for this claim [pattern or practice], although the court will also evaluate other evidence presented as it may bolster or detract from the statistical evidence. . . .
>
> The course that the court will follow in regard to the class action claim will be to evaluate the statistical evidence before it, keeping in mind the court's rulings in the named plaintiffs' cases, as well as the other evidence.

[8] The court determined that the anecdotal evidence did not establish proof of a patter or practice of discrimination even though it had established individual violations in three instances. The court noted when summarizing her conclusions on the class claim that:

> Whatever the differences in employment conditions between men and women in the Oregon State System of Higher Education, they have been explained by the Board on legitimate, nondiscriminatory reasons, except in three instances.

We are satisfied that the court properly considered the relevant anecdotal evidence when it ruled on the class action.

Statistical evidence was the primary foundation of plaintiffs' class action. Plaintiffs offered copious amounts of evidence, including multiple regression analyses, directed toward proving discriminatory intent. The board responded by challenging the accuracy and importance of plaintiffs' evidence and by offering its own statistical evidence to show lack of discriminatory intent. The court found that there was a failure of proof as to the existence of

discriminatory intent. Plaintiffs assign this finding as error and assert that the statistical evidence, both their own and defendant's, proves a pattern or practice of sex discrimination "at every institution in every year studied in pay, rank, and tenure decisions."

[9] In response to statistical evidence presented in an effort to establish discriminatory intent, a defendant is always entitled to offer rebuttal evidence. Rebuttal evidence usually includes an explanation of statistical disparities based on neutral factors. It can, however, be limited to (1) a showing that the plaintiffs' statistics are flawed, (2) a demonstration that the disparities generated or isolated by the statistics are not statistically significant or actionable, or (3) presentation by the

defendant of statistical evidence contradicting that of the plaintiffs. See Teamsters, 431 U.S. at 339-340, 97 S. Ct. at 1856 ("statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted").

[10] In the employment discrimination context, a defendant should also be entitled to challenge the ability of statistical evidence based on mathematical regressions to approximate the actual determinative factors in the employment decision-making process. See T. J. Campbell, Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 Stan. L. Rev. 1299, 1305-1312 (1984) (arguing that courts should not rely on regression analyses whose "goodness of fit" or

"adjusted R^2" - a measurement of the degree to which the statistical model reflects actual decision-making - has been called into serious question). This concern is particularly important where courts examine academic and professional employment and advancement decisions which properly include a high regard for subjective personnel qualities and characteristics. See Spaulding, 740 F.2d at 704; Zahorik v. Cornell University, 729 F.2d 85, 92-94 (2nd Cir. 1984); Green v. Board of Regents of Texas Tech. University, 474 F.2d 594, 596 (5th Cir. 1973).

The court accepted and analyzed a prodigious amount of statistical evidence proffered by both plaintiffs and defendant in the forms of expert testimony, cross-examination, and documentary evidence. In the end, after

reviewing the lengthy course of the trial, the district court decided that neither side's statistical evidence accurately reflected the complex factors and motivations guiding the board's employment, salary, and advancement decisions.

In Bazemore, the Supreme Court reversed a lower court decision that had deemed multiple regression analyses that did not include all measurable variables to be "unacceptable as evidence of discrimination." 106 S. Ct. 3008-09. The Court seemed to address the problem presented here, namely, the weight properly accorded multiple regression evidence.

> While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an

> analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.' Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.
>
> Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

106 S. Ct. at 3009 (citations and footnote omitted).

Bazemore, however, does not give

blanket approval to the introduction of all evidence derived from multiple regression analyses. See id. 3009, n. 10 ("There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant.")

[10] Plaintiffs assert that the district judge required too much of their statistical proof. We disagree. The district judge admitted statistical multiple regression evidenced at trial and then chose to discount the weight of that evidence during her deliberations following trial. In her memorandum, the district judge expressly noted that in plaintiffs' statistical analyses important decision-making variables were either missing or inadequately represented. Missing parts of the plaintiffs' interpretation of the board's decision-making equation included such

highly determinative quality and productivity factors as teaching quality, community and institutional service, and quality of research and scholarship. The district court concluded that variables missing from the model must have had a significant influence on salary and advancement decisions. Without reiterating the details of the district court's extensive criticisms of the plaintiffs' statistical evidence, after our own consideration of the evidence, we hold that the district court did not clearly err in concluding that the plaintiffs failed to establish the existence of actionable discrimination by a preponderance of the evidence.[1]

---

[1]We note in passing that it is often acceptable in the social sciences to use a statistical model for proof of behavior even where, in an absolute sense, that model does not describe the data well. However, courts are not free to decide

We note that by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs.[2] The judge was simply unpersuaded. The heavy burden accepted by the plaintiffs in this action was ultimately to prove intentional discrimination across the whole state

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legal propositions on hypothetical evidence. This is especially true where courts are asked to draw inferences as to the existence of hidden discriminatory motives from statistical evidence. See Spaulding v. University of Washington, 740 F.2d 686, 704 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S. Ct. 511, 83 L.Ed.2d 401 (1984).

[2] Plaintiffs seize upon a possible erroneous belief held by the district judge that the board was correct in its use of faculty rank as an "objective piece of data." This intermediate shifting of the burden of persuasion, however, even if error, does not appear to have affected the outcome of the trial.

system of higher education. Although an attempt to prove a narrower case might have prevailed, the plaintiffs failed to prove this case.

III. DENIAL OF A FAIR TRIAL

Plaintiffs assert that they were denied a fair trial by the cumulative effect of numerous pretrial and trial errors. They urge reversal and remand for a new trial before a different judge.

District courts have broad discretion in controlling the conduct of a trial Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1515 (Fed. Cir.), cert. denied, 469 U.S. 871, 105 S. Ct. 220, 83 L.Ed.2d 150 (1984); Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1208 (9th Cir. 1982). Federal Rule of Evidence 611(a) directs trial judges to exercise "reasonable control" over the presentation of evidence and

interrogation of witnesses. "Very few cases outside of the criminal law area support an appellate finding of general judicial misconduct during trial. . . . The standard for reversal is whether the trial was unfair." Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1289 (9th Cir. 1984), cert. denied, 469 U.S. 1190, 105 S. Ct. 963, 83 L.Ed.2d. 968 (1985). Some of plaintiffs' allegations on this issue raise questions, but they do not approach a showing that the trial was unfair.

A. Exclusion of Statistical Experts

[12] Plaintiffs challenge, for example, the court's order to exclude the testimony of two of their expert witnesses, Doctors Arrow and Olkin. The exclusion was a sanction imposed for violation of court orders. Because scheduling was important in this complex

litigation, we defer to the court's discretion unless it was clearly abused. Obviously, there was a misunderstanding on the part of plaintiffs' counsel. However, as the court noted, he failed to "memorialize" his understanding.

Technically, he violated the court's scheduling orders. Judge Frye's finding to that effect is not clearly erroneous. See United States v. National Medical Enterprises, Inc., 792 F.2d 906, 911 (9th Cir. 1986) (court's determination that an order was violated is reviewed under the clearly erroneous standard). No showing of willful disobedience is required for an exclusion order. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207-08 (1958) (party "refuses to obey" simply by failing to comply). When a trial runs on month after month, some tightening of

schedules is to be expected.

The challenged preclusion order is justified under Fed. R. Civ. P. 37(b)(2)(B). The order was specifically tailored to the violation and was not an abuse of discretion. See Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-98 (8th Cir. 1978) (no abuse of discretion in court's exclusion of exhibits and witnesses not disclosed in compliance with pretrial orders); United States v. Sumitomo Marine & Fire Insurance Co., Ltd., 617 F.2d 1365, 1369-70 (9th Cir. 1980) (order precluding government from introducing evidence as sanction for failing to comply with discovery order was not an abuse of discretion).

B. Rebuttal Time Schedule

Plaintiffs assert that they were unfairly denied an opportunity to rebut defendant's statistical evidence. There

was much disagreement over scheduling of the rebuttal case, complicated by the court's demand for a termination date in early November 1984 to prepare for another trial.

On September 26, 1984, the court ordered plaintiffs to submit their statistical rebuttal reports on October 3, before the board's statistical experts testified. she explained that these reports "relate to defendant's statistical reports, which plaintiffs have had since May." She noted that plaintiffs already had violated her scheduling order by missing the September 10 deadline.

Later, On October 17, 1984, she admonished plaintiffs for their failure to comply with the scheduling order regarding the submission of new case-in-chief statistical studies. This failure "has resulted in a convolution in the

order of proof in this case," she wrote. Then, she established the rebuttal schedule about which plaintiffs now complain and by written opinion overruled plaintiffs' objections.

[13] The court has broad discretion in fashioning appropriate scheduling orders. See Rodriguez v. Olin Corp., 780 F.2d 491, 494 (5th Cir. 1986) (order of proof committed to district court discretion); Coursen v. A.H. Robbins Co., Inc., 764 F.2d 1329, 1340 (9th Cir. 1985) (timing of trials and control of docket are left to trial court discretion).

[14] As explained below, the court may have severely restricted plaintiffs in their ability to run new studies on the redefined class. While it is true that the defense was also restricted in its proof, most of the court's time constraints fell on plaintiffs. Nonetheless, these constraints followed

plaintiffs' repeated failure to meet the court's deadlines. These facts do not establish reversible error.

C. Late Redefinition of Class

Plaintiffs assign error to the court's redefinition of the class after six months of trial and the refusal to permit additional discovery.

By order filed October 13, 1981, the court certified a class "of all those women faculty members who . . . were employed as instructor through professor" during the relevant period at the eight Oregon universities. In her December 10, 1982 order denying defendant's motion to certify an interlocutory appeal of the class certification issue, the judge wrote that she "may alter the class certification decision at any time before the final decision on the merits under rule 23(c)(1)."

On August 10, 1984, she limited the

class to "regular teaching faculty," excluding nonteaching faculty and nonregular instructors. Plaintiffs do not dispute the court's power to adjust the class definition to conform to the proof. It is the court's manner of class reduction to which they object.

After the plaintiffs moved for reconsideration and clarification of the class redefinition order, or alternatively for more discovery time to create a new data base for further statistical studies, the court permitted plaintiffs to present new statistical studies by September 26, 1984. That deadline was extended to October 3, but apparently was disregarded by plaintiffs. The court's attempts to accommodate the late submission of new studies led to the disrupted rebuttal schedule previously discussed.

[15] Again, the question is whether

the plaintiffs were deprived of a fair opportunity to prove their case. The court had allowed so much delay and redundant material to enter the case at this point that control was becoming a problem. The plaintiffs do not establish such an abuse of discretion as to warrant another trial with an expanded plaintiff class if one could be established.

D. Daily Transcript

Defendant board arranged for a daily transcript at a cost of $1,000 per day. the court reporter furnished a copy to the court, as is customary in most districts. The reporter did not offer a free copy to plaintiffs. The sale of such copies is a regulated industry. Plaintiffs now assert that the defendant's action in providing the court with a daily transcript amounts to an impermissible ex parte communication. they allege prejudice due to the

defendant's ability, and their inability, to refer to transcripts during discussion with the court.

[16] We have found no authority holding that furnishing daily transcripts to the court is an illegal or unethical ex parte communication. There simply is no "communication." The defense paid the official court reporter to prepare daily transcripts. That reporter was employed by the court. As long as testimony was being transcribed for someone's benefit, the court could gain access to that transcript simply by requesting an extra copy. It was the court's prerogative to do so. The fact that the board may have initiated the extra copying is irrelevant. Plaintiffs could have purchased any or all of the transcripts simply by placing orders for them. This court has no basis upon which to find reversible error in the court's reference

from time to time to a transcript of the testimony.

E. Cost of Corrected Data Base

During discovery, plaintiffs acquired copies of the board's central computer base tapes of faculty information from 1977 through 1982. These tapes had been maintained in the ordinary course of business. These data were the basis for the plaintiffs' statistical studies in the class action phase of the case.

After both sides' experts had discovered inaccuracies in the original data base, the board allowed plaintiffs access to their files and business records. Plaintiffs moved to compel the board to correct and update the inaccuracies in the tapes. The judge rules that the board "was not obligated under the Federal Rules to make data compilations more extensive or accurate

than those used by the defendant in the ordinary course of defendant's business." She ordered that the board make available to plaintiffs any revisions to the data base made in preparation for trial with costs to "be borne equally by plaintiffs and defendants."

The board chose to correct the inaccurate data base for use at trial, at a cost of approximately $100,000. Plaintiffs declined to accept and pay for half the cost of these corrections. They now assert that the court erred in requiring them to share the costs of correcting the data base. We do not think, however, that the district court had any obligation to require the defendant to subsidize the plaintiffs' costs of litigation.

Under the Fed. R. Civ. P.26(c)(2), the court may order that "discovery may be had only on specified terms and

conditions." This rule empowers district courts to order that a party seeking discovery pay a portion of the expenses incurred in obtaining discoverable materials. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358, 98 S. Ct. 2380, 2393, 57 L.Ed.2d 253 (1978); In re Puerto Rico Electric Power Authority, 687 F.2d 501, 507 (1st Cir. 1982); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 448 (W.D. Mo. 1976) (defendant ordered to pay one-half of the reasonable costs of preparing interviews and obtaining transcripts thereof). Such orders are reviewed for an abuse of discretion. National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 609 (11th Cir. 1984), cert. denied, 471 U.S. 1056, 105 S. Ct. 2120, 85 L.Ed.2d. 484 & ____ U.S. ____, 106 S. Ct. 544 88 L.Ed.2d 473

(1985). There was no abuse of discretion here.

CONCLUSION

While the plaintiffs find fault with trial court's use of the statistical evidence, and with 20-20 hindsight, this court itself might view some of the statistical evidence differently, we have found nothing in the record to convince us that another trial would produce a different result. The three faculty members who did prove some elements of discrimination in their own cases recovered appropriate judgments. The class as a whole failed to establish by the preponderance of the evidence that the Oregon State Board of Higher Education had any systematic intent to discriminate or that discrimination was a "standard operating procedure" of the board. The statistics may have proved that there were disparities in salaries

and other terms of employment, but not that they were the product of disparate treatment. The trial judges' findings of fact withstand Rule 52 review.

AFFIRMED

2. 42 U.S.C. Sec. 2000e-2(a) (1984).

2000e-2. Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer - -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Sec. 2000e-5 (f)(3) and (k) (1984).

(f)(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of section 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

. . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

3. Oregon Revised Statutes (ORS) Chapter 351

DEPARTMENT OF HIGHER EDUCATION
(State Board)

351.010 State Board of Higher Education. The Department of Higher Education shall be conducted under the control of a board of 11 directors, to be known as the State Board of Higher Education. Two shall be students admitted at different public institutions of higher education in Oregon at the time of their appointment. [Amended by 1973 c.379 §1]

351.020 Directors; appointment; confirmation. The directors shall be citizens of Oregon and shall be appointed by the Governor. The appointment is subject to the confirmation of the Senate in the manner provided by ORS 171.562 and 171.565. No director who is not a student at the time of his appointment may be an employe of any of the institutions or departments under the control of the State Board of Higher Education, nor shall more than seven graduates of or students admitted at these institutions, nor more than three graduates of or students admitted at any one of these institutions or departments, be members of the board at any time. To assist the Governor in making appointments of the student members provided in ORS 351.010, the duly organized and recognized entities of student government at each state institution of higher education shall submit a list of nominees to the Governor. The entities are entitled to no more than three nominees per school. The Governor shall consider this list in the selection of student members to the State Board of Higher Education. [Amended by 1955 c.284 §1, 1969 c.695 §6, 1973 c.379 §2]

351.030 [Repealed by 1961 c.167 §38 (171.560 enacted in lieu of 351.030)]

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351.040 Term, removal; compensation and expenses of directors. (1) Directors shall hold office for a term of four years except for directors who are students at the time of appointment, whose terms shall be two years. All terms begin July 1 of the year of appointment. No person may be appointed to serve consecutively more than two full terms as a director. Any person appointed to fill a vacancy occurring prior to the expiration of any term shall be appointed for the remainder of such term.

(2) The Governor may remove any member of the board at any time for cause, after notice and public hearing, but not more than three members shall be removed within a period of four years, unless it be for corrupt conduct in office.

(3) The directors are entitled to compensation and expenses as provided in ORS 292.495.
[Amended by 1961 c.167 §41; 1967 c.530 §8; 1969 c.314 §25; 1971 c.485 §3; 1973 c.379 §3]

351.050 Officers; meetings; quorum. The board shall organize by the election from its members of a president who shall serve for the fiscal year for which he is elected. The board shall meet regularly once every three months at such times and places as the president may determine. Special meetings may be called by the president upon the written request of any six members of the board. Six members shall constitute a quorum for the transaction of business.
[Amended by 1973 c.379 §4]

351.060 Board general powers as to control and management of property; power as to litigation. The State Board of Higher Education may:

(1) Control and provide for, subject to the conditions of this section, the custody and occupation of the grounds, buildings, books, papers and documents belonging to each and all the institutions, departments or activities under the control of the State Board of Higher Education.

(2) Manage, control and apply all property of whatever nature given to or appropriated for the use, support or benefit of any or all of the institutions, departments or activities under the control of the State Board of Higher Education, according to the terms and conditions of such gift or appropriation.

(3) Erect, improve, repair, maintain, equip and furnish buildings, structures and lands for higher education.

(4) Acquire, receive, hold, control, convey, sell, manage, operate, lease, lend, invest, improve and develop any and all property, real or personal:

(a) Given to any of the institutions, departments or activities under the control of the State Board of Higher Education by private donors, whether such gifts are made to the State Board of Higher Education or to the State of Oregon; or

(b) Acquired by any other method or from any source by the State Board of Higher Education for the benefit of any of the institutions, departments or activities under the control of the board, subject, however, to the applicable provisions of ORS 271.300 to 271.370, 271.390 and 351.210.

(5) Take and hold mortgages on real and personal property acquired by way of gift or arising out of transactions entered into in accordance with the powers, duties and authority given to the board by this section, ORS 351.070 and 351.150.

(6) Institute, maintain and participate in suits and actions and other judicial proceedings, in the name of the State of Oregon, for the foreclosure of such mortgages or for the purpose of carrying into effect any and all of the powers, duties and authority given to the State Board of Higher Education by this section, ORS 351.070 and 351.150. [Amended by 1959 c.570 §1; 1975 c.771 §31a]

351.065 Consent of, access to and control of personnel records. (1) The State Board of Higher Education may, for each institution, division and department under its control adopt rules and specific orders by or through the institutional executive of each institution governing access to personnel records of the institution, division or department, which are less than 25 years old.

(2) Rules adopted under subsection (1) of this section shall require that personnel records be subjected to restrictions on access unless upon a finding by the institutional executive that the public interest in maintaining individual rights to privacy in an adequate educational environment would not suffer by disclosure of such records. Access to such records may be limited to designated classes of information or persons, or to stated times and conditions, or to both, but cannot be limited for records more than 25 years old.

(3) No rule or order promulgated pursuant to this section shall deny to a faculty member full access to the member's personnel file or records kept by the board or its institutions, schools or departments, except as provided in paragraphs (d) and (e) of this subsection.

(a) The number of files relating to the evaluation of a faculty member shall be limited to three, to be kept in designated, available locations.

(b) Any evaluation received by telephone shall be documented in each of the faculty member's files by means of a written summary of the conversation with the names of the conversants identified.

(c) A faculty member shall be entitled to submit, for placement in the three files, evidence rebutting, correcting, amplifying or explaining any document contained therein and other material which the member believes might be of assistance in the evaluation process.

(d) Letters and other information submitted in confidence to the board or its institutions, schools or departments prior to July 1, 1975,

shall be maintained in the files designated. However, if a faculty member requests access to those files, the anonymity of the contributor of letters and other information obtained prior to July 1, 1975, shall be protected. The full text shall be made available except that portions of the text which would serve to identify the contributor shall be excised by a faculty committee. Only the names of the contributors and the excised portions of the documents may be kept in a file other than the three prescribed by paragraph (a) of this subsection.

(e) Confidential letters and other information submitted to or solicited after July 1, 1975, by the board or its institutions, schools or departments prior to the employment of a prospective faculty member are exempt from the provisions of this section. However, if the member is employed by the board or its institutions, schools or departments, the confidential preemployment materials shall be placed in the three authorized files. If a faculty member requests access to the member's files, the anonymity of the contributor of confidential preemployment letters and other preemployment information shall be protected. The full text shall be made available, except that portions of the text which would serve to identify the contributor shall be excised and retained in a file other than the three designated in paragraph (a) of this subsection.

(f) Classroom survey evaluation by students of a faculty member's classroom or laboratory performance shall be anonymous. The record of tabulated reports shall be placed in at least one of the files designated in paragraph (a) of this subsection. All survey instruments used to obtain evaluation data shall be returned to the faculty member.

(g) After July 1, 1975, the board, its institutions, schools or departments when evaluating its employed faculty members shall not solicit nor accept letters, documents or other materials, given orally or in written form, from individuals

or groups who wish their identity kept anonymous or the information they provide kept confidential.

(4) No rule or order promulgated pursuant to this section limits the authority of the institution, division or department to prepare, without identification of individual persons who have not consented thereto, statistical or demographic reports from personnel records.

(5) Any category of personnel records specifically designated as confidential pursuant to valid rules or orders pursuant to this section shall not be deemed a public record for the purposes of ORS 192.420.

(6) As used in this section, "personnel records" means records containing information kept by the institution, division or department concerning a faculty member and furnished by the faculty member or by others about the faculty member at the member's or at the institution, division or department's request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons. [1971 c.566 §1; 1975 c.317 §1; 1979 c.159 §1]

351.070 Board general powers as to higher education and institutions; student records. (1) The State Board of Higher Education may, for each institution under its control:

(a) Appoint and employ a president and the requisite number of professors, teachers and employes, and prescribe their compensation and tenure of office or employment.

(b) Demand and receive the interest mentioned in ORS 352.510 and all sums due and accruing to the institutions of higher education for admission and tuition therein, and apply the same, or so much thereof as is necessary, to the payment of the compensation referred to in paragraph (a) of this subsection and the other current expenses of the institutions.

(c) Prescribe fees for enrollment into the institutions. Such enrollment fees shall include tuition for education and general services and such other charges found by the board to be necessary to carry out its educational programs.

(d) Prescribe incidental fees for programs under the supervision or control of the board found by the board, upon its own motion or upon recommendation of the recognized student government of the institution concerned, to be advantageous to the cultural or physical development of students.

(e) Upon recommendation of the recognized student government, collect optional fees authorized by the institution executive, for student activities not included in paragraph (c) or (d) of this subsection. The payment of such optional fees shall be at the option and selection of the student and shall not be a prerequisite of enrollment.

(f) Confer, on the recommendation of the faculty of any such institution, such degrees as usually are conferred by such institutions, or as they deem appropriate.

(g) Prescribe the qualifications for admission into such institutions.

(2) The State Board of Higher Education may, for each institution, division and department under its control:

(a) Supervise the general course of instruction therein, and the research, extension, educational and other activities thereof.

(b) Adopt rules and bylaws for the government thereof, including the faculty, teachers, students and employes therein.

(c) Maintain cultural and physical development services and facilities therefor and, in connection therewith, may cooperate and enter into agreements with any person or governmental agency; and may provide student health services and contract therefor.

(d) Except as otherwise provided by law, prescribe and collect charges for services rendered to any person or entity.

(e) Pursuant to the procedures described in ORS 351.065, adopt rules relating to the use of and access to student records of the institutions including the opportunity to challenge inaccurate information placed in student records. However, except for directory information, records containing information kept by the institution, division or department concerning a student and furnished by the student or by the institution, division or department, including, but not limited to, information concerning discipline, counseling, membership activity, academic performance or other personal matters, shall not be available to public inspection or disclosure for any purpose except with the written consent of the student who is the subject of the record or upon order of a court of competent jurisdiction or, in an emergency, to appropriate persons if such information is necessary to protect the health or safety of the student or other persons. Nothing contained in this paragraph prohibits authorization of the inspection of such records by institution officials or employes who have a legitimate educational interest in inspecting student records, or by any representative of a state or federal governmental agency that is required by law to inspect student records. Rules may be adopted permitting release of personally identifiable information in connection with financial aid for which a student has applied or which a student has received. Directory information shall be defined by rules adopted by the State Board of Higher Education.

(3) As used in subsection (2) of this section, "legitimate educational interest" means the demonstrated need to know by those officials of an institution who act in the student's educational interest, including faculty, administration, clerical and professional employes, and persons who manage student record information.

[Amended by 1953 c.545 §2; 1971 c.375 §1; 1971 c.708 §9; 1973 c.331 §1; 1979 c.159 §2]

351.072 Adoption of certain standards not subject to rulemaking procedures; limitations. (1) Notwithstanding ORS 183.310 to 183.550, the following actions may be taken by the State Board of Higher Education or the educational institutions under its control without compliance with the rulemaking provisions of ORS 183.310 to 183.550:

(a) Adoption of standards, regulations, policies or practices by any of the educational institutions under the control of the State Board of Higher Education relating primarily to admissions, academic advancement, classroom grading policy, the granting of academic credits, granting of degrees, scholarships and similar academic matters.

(b) Adoption of fees or fee schedules by the State Board of Higher Education or any of the educational institutions under its control, relating to charges for symposiums, conferences, short courses, food, books or other retail goods, prices of admission to athletic, entertainment or cultural events or advertising rates in student or institutional publications. However, student loan service charges, charges levied as penalties for prohibited conduct, general tuition, building fees, incidental fees, health service fees and residence hall and housing charges shall be adopted in accordance with the provisions of ORS 183.310 to 183.550.

(2) Any standards, regulations, policies, practices or fees adopted under this section by the State Board of Higher Education or by any of the educational institutions under its control shall be reduced to writing and made available to interested persons upon request. [1979 c.593 §31]

(Chancellor)

351.075 Chancellor of State Board of Higher Education; appointment; qualifications; compensation. (1) The State Board of

Higher Education shall appoint a chief executive officer who shall be known as the Chancellor of the State Board of Higher Education and who shall serve at the pleasure of the board. The board may appoint one or more assistants as may be necessary.

(2) The chancellor and his assistants shall be persons who by training and experience are well qualified to perform the duties of their offices and to assist in carrying out the functions of the board under ORS 351.010 to 351.070, 351.075 to 351.840, 352.010 to 352.055, 352.065 to 352.370, 352.390, 352.400 and 352.510 to 352.990.

(3) The State Board of Higher Education shall fix the compensation of the chancellor and his assistants. [1971 c.708 §10]

351.080 [Repealed by 1961 c.238 §1]

351.085 Duties and powers of chancellor. The Chancellor of the State Board of Higher Education shall exercise, under the direction of the State Board of Higher Education, the administrative authority necessary to carry out the policies of the board with respect to the institutions, departments or activities under the control of the board. In carrying out his duties, the chancellor shall:

(1) Act as administrative officer of the State Board of Higher Education.

(2) Maintain a centralized service program for all institutions, departments and activities, including but not limited to, accounting, statistical services, capital construction, management analysis, legal services, academic affairs and educational research.

(3) Collect and compile information and statistics relative to the operation of the institutions, departments and activities of the State Board of Higher Education.

(4) Prepare and submit to the State Board of Higher Education an annual operating budget for all institutions, departments and activities of the board.

(5) Oversee the preparation and submission to the State Board of Higher Education of the biennial budget requests of the institutions, departments and activities for consideration by the board as the budget request to the Governor under ORS 351.090. The chancellor shall provide analyses of the budget requests of the institutions, departments and activities, including in such analyses alternative considerations as may be necessary or desirable for the board in the adoption of its budget request.

(6) Appoint, subject to the State Personnel Relations Law, and with the approval of the State Board of Higher Education, such personnel as may be necessary for the performance of his duties.

(7) Designate, if he wishes, one or more suitable persons to sign or countersign warrants, vouchers, certificates, or other papers and documents requiring the signature of the chancellor.

(8) Prepare the agendas for State Board of Higher Education meetings and provide an analysis of proposals made to the board, including such alternatives as may be necessary or desirable for their consideration, and make recommendations thereon.

(9) Prepare and submit to the State Board of Higher Education on or about December 31 of each year an annual report in which he describes the principal activities of the Department of Higher Education during the fiscal year ending June 30. The report shall include a statement of all funds received, the source or sources from which received, the expenditure and disbursement of all funds and the purposes for which they were expended. The report shall contain a statement of the number of students enrolled in each institution, department or activity, the number of degrees conferred, the improvements made and new courses of instruction added, together with a statement showing a general way the status of all activities and functions of the State Board of Higher Education.

(10) Keep a record of the transactions of the State Board of Higher Education.

(11) Have the custody of all books, papers, documents and other property belonging to the State Board of Higher Education.

(12) Give such instructions as may be necessary to carry out the directives of the State Board of Higher Education and forward them to the various institution presidents and heads of departments and activities.

(13) Provide for meetings of the presidents and principal executives of the institutions, departments and activities, at such times as the State Board of Higher Education may direct, such meetings to be open to any member of the board. At such meetings, the executives of the Department of Higher Education may propose policies or policy changes or statements for consideration by the board and develop recommendations concerning allocations of funds.

(14) The chancellor shall perform such other administrative assistance and consider other administrative matters as the State Board of Higher Education may require. [1971 c.708 §11]

(Administration)

351.090 Standardization of accounts and records; preparation of budget; allocation of funds. The board of higher education shall prescribe for all state-supported higher educational institutions a standardized system of accounts and records. The board shall prepare biennially, at such time as he shall require, a report to the Governor containing the proposed budget for the succeeding biennium covering in detail the purposes for which all expenditures shall be made. In preparation of this budget the

board may allocate to the respective institutions over which it is authorized to exercise supervision and control all funds then available and all funds which under laws then existing become available during the succeeding biennium from all sources, so far as they can be ascertained, in accordance with the board's higher educational development program.

351.095 [1971 c.708 §8; repealed by 1983 c.194 §1]

351.100 Advertising and publicity. All advertising and publicity on behalf of all branches of state-supported higher education shall emanate from and bear the name of the Department of Higher Education, and shall be conducted in such a way as to present to the citizens of the state and prospective students a fair and impartial view of the higher educational facilities provided by the state and the prospects for useful employment in the various fields for which those facilities afford preparation.

351.110 Relationship with state legislature. All relationships and negotiations between the state legislature and its various committees and the institutions of higher education shall be carried on through the Department of Higher Education. No subordinate official representing any of the separate institutions shall appear before the legislature or any committee except upon the written authority of the board of higher education.

351.120 [Amended by 1959 c.564 §14; renumbered 351.605 and then 348.210]

351.130 Encouragement of gifts to institutions; use of gifts. The board of higher education shall encourage gifts to the institutions by faithfully devoting such funds to the institution for which intended and by other suitable means. All gifts raised by any institution or given to it shall be held for the exclusive use of such institution, subject to the terms of gift. Subject to such terms, such gifts to the institutions and the Department of Higher Education

may be invested in securities which constitute legal investments for trust funds held for charitable or educational purposes, in lawfully issued interest-bearing bonds or obligations of the State of Oregon and in real property.

351.140 Board power to purchase real property. (1) The State Board of Higher Education may purchase such real property as in its sole discretion may be necessary for the present or future development of any of the schools or institutions under its jurisdiction. The board may enter into contracts of purchase or agreements which it deems necessary in carrying out this authorization.

(2) The board may apply any funds coming into its hands, and applicable thereto, toward the purchase of property authorized under this section. The board may also mortgage or pledge any property so purchased, or its contracts to purchase, or in relation thereto, together with the income from such property, to secure the payment of the purchase price thereof.

351.150 Title to institution realty; conveyances. Legal title to all real property acquired by any of the institutions under the control of the State Board of Higher Education shall be taken and held in the name of the State of Oregon. Legal title to all real property heretofore or hereafter conveyed to any such institutions shall be deemed to be conveyed to and vested in the State of Oregon. Authorized conveyances of all real property acquired by or vested in the State of Oregon for the use or benefit of any such institutions, other than the university lands referred to in ORS 273.251, shall be executed in the name of the State of Oregon by the president and secretary of the board of higher education. Nothing in this section or in ORS 351.060 shall be considered as exempting such property from taxation.

351.153 "Structure" defined. As used in ORS 351.160, 351.170, 351.180, 351.350, 351.440 and 351.450, "structure" includes, but is not limited to, paving, sidewalks, curbs, gutters, sewers, drainage works, vehicular parking facilities, lighting facilities, retaining walls and other constructed or erected improvements to real property. [1971 c.361 §2]

351.155 Authority to sell forest products on institution realty. Notwithstanding the applicable provisions of ORS 279.025 to 279.031, 279.310 to 279.356 and 279.400 to 279.990, the State Board of Higher Education may, in the management of all forest lands under its control and supervision, sell the forest products on such lands in the same manner as is provided in ORS 530.059, and for that purpose the State Board of Higher Education shall have the same powers with respect to experimental or research projects in the field of forest land management or for forest product utilization on forest lands under its control as the State Forester has pursuant to the provisions of ORS 530.050 and 530.059. [1961 c.134 §1]

351.160 Building construction. (1) The board of higher education may undertake the construction of any building or structure for higher education when, in the judgment of the board, it appears that the building or structure will be wholly self-liquidating and self-supporting from revenues to accrue from the operation thereof and from gifts, grants or building fees, and from unobligated revenues of buildings or projects of like character. The board may enter into contracts for the erection, improvement, repair, equipping and furnishing of buildings and structures for dormitories, housing, boarding, off-street motor vehicle parking facilities and other purposes for higher education pursuant to Article XI-F (1) of the Oregon Constitution, ORS 351.160 to 351.190, 351.350 to 351.460, 351.480 and 351.490.

(2) The board may also undertake the construction of those buildings and structures that are designated by the Legislative Assembly for higher education institutions and activities, and may enter into contracts with persons, firms or corporations for the erection, improvement, repair, equipping and furnishing of such buildings and structures pursuant to Article XI-G of the Oregon Constitution and ORS 351.345. [Amended by 1963 c.573 §5; 1963 c.584 §2]

351.170 Charges for use of buildings; student building fee; disposition of receipts. (1) The board of higher education shall establish such rates, charges and fees for use of buildings, structures or projects referred to in ORS 351.160 (1), including revenue-producing buildings and structures already constructed, as, in the judgment of the board, will provide the required revenues to make the particular new building, project or structure self-liquidating and self-supporting, and as will provide the funds with which to amortize the principal of and pay the interest on the bonds issued to finance such buildings, structures or projects.

(2) The board shall charge and collect from each regular student a building fee at a rate not to exceed $12.50 for each regular term, for not less than three terms in each regular academic year, and not to exceed $18.75 if instruction is on a semester basis, or an equivalent rate of charge where instruction is on a different basis. The board is authorized to maintain adequate sinking funds for bonds outstanding. The fee shall be in addition to tuition and other fees charged to students and shall be deposited with the State Treasurer and credited to the appropriate subfund of the Higher Education Bond Sinking Fund. [Amended by 1963 c.638 §3; 1963 c.584 §3; 1975 c.331 §13]

351.180 Building insurance. The board of higher education may cause the buildings, structures or projects referred to in ORS 351.160 and 351.170 and the equipment and furnishings

therein and the appurtenances thereto to be insured against fire and other hazards in such sums as will protect the holders of the outstanding bonds issued to finance the cost thereof. Such insurance shall be in lieu of that afforded by the Restoration Fund, without right of insurers, in the event of loss, to subrogation to or contribution from said fund. [Amended by 1963 c.584 §4]

351.190 Acquisition of land for building purposes. The board of higher education may obtain, by donation, purchase, agreement or condemnation, the title to any land authorized to be acquired by ORS 351.345, 351.350 and 351.450. Condemnation proceedings instituted by the board shall be conducted in accordance with ORS chapter 35. [Amended by 1957 c.720 §1; 1963 c.548 §5; 1971 c.741 §25]

351.195 [1957 c.585 §1; 1969 c.349 §3; repealed by 1975 c.771 §33]

351.200 Board power over higher education curricula and departments. (1) The board of higher education shall visit the University of Oregon and Oregon State University for the purpose of inquiring as to the work offered and conducted at such institutions, whenever and as often as it may deem necessary. The board shall specifically determine from time to time as occasion may require what courses or departments, if any, shall not, in their judgment, be duplicated in the several higher educational institutions. The board may direct the elimination of duplicate work from any institution, and determine and define the courses of study and departments to be offered and conducted by each institution.

(2) A record of such determination shall be kept by the board in a book provided by the Secretary of State for that purpose. The board shall notify the Governor of such determination and each institution affected shall conform thereto.

(3) If any changes are made in the curricula of any institution, the change shall become effective at the beginning of the school year following the determination.

(4) Any person may appear before the board of higher education at any meeting for the purpose of laying before the board any data or arguments for the maintaining or elimination of any duplicated course or department.

351.203 Cooperation with Oregon Educational Coordinating Commission; compliance with certain commission decisions. (1) The State Board of Higher Education shall cooperate with the Oregon Educational Coordinating Commission in the development of a state comprehensive education plan including post-secondary education and in review of the board's programs and budget as provided in ORS 348.705 to 348.825.

(2) The board shall comply with the decisions of the commission regarding proposed new post-secondary programs and proposed new post-secondary locations determined by the commission to have a significantly adverse impact on one or more segments of education other than public institutions under the jurisdiction of the board. [1975 c.553 §12]

351.205 Interchange of faculty members with schools outside Oregon. The State Board of Higher Education may allow interchange of members of the faculties of institutions of higher learning with faculty members of comparable institutions of other states or countries for a period of one year. Such exchange service shall, for all purposes, be deemed continued service with the Oregon institution covered, with salary paid to the absent faculty member accordingly. Salary for the visiting faculty member shall not be paid by the Oregon institution covered. [1967 c.239 §1]

351.210 Disposition of unnecessary equipment. The board of higher education may sell or otherwise dispose of any worn out, obsolete or otherwise unsuitable equipment or material, the disposal of which would in the board's judgment be to the financial benefit of the institutions under the board's control. Before such disposal or sale, the board shall submit to the Department of General Services a proposal for such sale or disposal and shall secure from the department its formal approval thereof. The proceeds from any sales or disposals made pursuant to authority granted in this section shall be deposited in the State Treasury to the credit of the board of higher education and may be expended by it for any purpose authorized by law in the same manner as it is authorized to make other expenditures.

351.220 Acquisition of intellectual property. The State Board of Higher Education may acquire by gift or by purchase interests in intellectual property of any kind, whether patentable or copyrightable or not, including patents, copyrights, inventions, discoveries, processes and ideas. The board may also agree to aid in the development of property acquired pursuant to ORS 351.220 to 351.250 and to pay an assignor of any interest in intellectual property a share of any moneys received on account of the board's ownership or management of the property. [1963 c.332 §1]

351.230 Management, development and disposition of intellectual property. The State Board of Higher Education may manage, develop or dispose of by assignment, sale, lease, license or other action deemed advisable by the board, property acquired under ORS 351.220, and may contract with any person or agency, board, commission or department of this or any other state or with the Federal Government regarding the management, development or disposition thereof. The board may make gratuitous assignments of such property to any

trust or fund, the sole beneficiary of which is the State Board of Higher Education or any of the institutions or activities under its control, subject to the share, if any, agreed to be paid to the assignor. The board may reassign such property to the inventor, author or discoverer. [1953 c.332 §2]

351.240 Terms and conditions of transactions in intellectual property; dissemination of information. The State Board of Higher Education may determine the terms and conditions of any transaction authorized by ORS 351.220 to 351.250 and need not require competitive bids in connection therewith. No formal publicity or advertising is required regarding property for the development of which the board wishes to contract, but the board shall make reasonable efforts to disseminate such information in appropriate research and industrial circles. [1953 c.332 §4]

351.250 Disposition of revenue; Higher Education Invention Fund. Moneys received by the board as a result of ownership or management of property acquired under ORS 351.220 to 351.250 or of transactions regarding such property shall be credited to a special fund in the State Treasury separate and distinct from the General Fund to be designated "Higher Education Invention Fund" and shall only be applied by the State Board of Higher Education to payment of the agreed share, if any, to assignors, and for the advancement of research or for the acquisition and development of intellectual property, or both. [1953 c.332 §5]

351.260 Planning assistance. The State Board of Higher Education may establish and maintain planning facilities and undertake planning work for the provision of, or related to, local planning services and may:

(1) Upon the request of the governing body of any municipality, county, Indian reservation or of a regional or joint planning agency in the

state, provide planning assistance to such municipality, county, Indian reservation or planning agency (including surveys, land use studies, urban renewal plans, technical services and other planning work) and make or assist in making a study or report upon any planning problem of such municipality, county, Indian reservation or planning agency.

(2) Agree with such governing body or planning agency as to the amount to be paid to the board for such service.

(3) Apply for and accept grants from the Federal Government and other sources in connection with any such planning work.

(4) Contract with respect thereto. [1955 c.536 §1; 1965 c.456 §1]

FINANCES

351.305 Definition for ORS 351.310 to 351.540. As used in ORS 351.310 to 351.540, "board" means the State Board of Higher Education.

351.310 Board's general financial power; appropriation of moneys received by board. (1) The board of higher education shall control the use, distribution and disbursement of all funds, appropriations and taxes now or hereafter in possession, levied and collected, received or appropriated for the use, benefit, support and maintenance of institutions, departments or activities of higher education, including the authorization of individuals to sign vouchers for the disbursement of funds for the various institutions, departments and activities.

(2) All moneys, except moneys appropriated from the State Treasury for expenditure within a specified period of time, heretofore or hereafter received by or on behalf of the State Board of Higher Education, or any institution, department or activity under its control, which are not

otherwise appropriated by law, hereby are appropriated continuously to the State Board of Higher Education for the purposes for which such moneys were donated, granted or received, in accordance with any applicable law governing the use of such moneys. [Amended by 1955 c.84 §1]

351.320 Prorating expenses. The board of higher education may prorate all expenses not otherwise provided for, incurred under authority of ORS 351.040, 351.050, 351.090 to 351.110, 351.130 and 351.310 to the institutions under its control, and pay the same from the funds available for the general expenses of those institutions.

351.330 [Repealed by 1957 c.370 §1]

351.340 Use of moneys. All sums of money provided by law for the support and maintenance of institutions and activities of higher learning may be used for the payment of salaries of instructors and employes, current expenses, construction of additional buildings, purchase of lands, purchase of equipment, purchase of library books and periodicals, purchase of laboratory supplies and apparatus, making necessary repairs and, in general, for the payment of all such expenses connected with the management of such institutions and activities of higher learning, as the board may from time to time determine. However, such money in the instruction budget of the board shall not be used to support hobby or recreation courses. [Amended by 1957 c.370 §3; 1978 c.1 §3]

351.345 Bond issue for higher education and community college projects. In order to provide funds for the purposes specified in Article XI-G of the Oregon Constitution, bonds may be issued in accordance with the provisions of ORS 286.031 to 286.061. [1963 c.584 §1; 1981 c.660 §24]

351.350 Bond issue for self-liquidating higher education purposes. In order to provide funds for the purposes specified in Article XI-F(1), Oregon Constitution, bonds may be issued in accordance with the provisions of ORS 286.031 to 286.061. [Amended by 1955 c.88 §1; 1957 c.703 §1; 1959 c.127 §1; 1961 c.38 §1; 1963 c.10 §1; 1963 c.515 §1; 1967 c.404 §9; 1969 c.664 §8; 1971 c.709 §7; 1975 c.331 §11; 1981 c.539 §7; 1981 c.660 §25]

351.353 Construction of parking facilities; bonds. (1) The State Board of Higher Education may undertake the construction of an off-street motor vehicle parking facility in Portland, Oregon, for higher education pursuant to Article XI-F(1), Oregon Constitution, ORS 351.160 to 351.190, 351.350 to 351.460, 351.480 and 351.490. The parking facility shall be for the use of the students and staff members of the board. The board shall establish the rates, charges and fees for use of the parking facility in accordance with the provisions of ORS 351.170.

(2) Bonds may be sold to finance the facility described in this section, in an amount authorized and under the conditions prescribed by ORS 351.350. [1963 c.573 §2; 1967 c.67 §18; 1981 c.660 §26]

351.440 Sale to State of Oregon or United States Government. The bonds may be sold to the State of Oregon or to the United States Government without advertisement thereof for public sale. [Amended by 1957 c.703 §5; 1981 c.94 §31; 1981 c.660 §27]

351.450 Higher Education Bond Building Fund. The moneys realized from sales of bonds issued to construct, improve, repair, equip and furnish buildings and other structures for higher education, and to purchase and improve sites therefor shall be credited to a special fund in the State Treasury separate and distinct from the General Fund, to be designated Higher Education Bond Building Fund. In the

Higher Education Bond Building Fund there shall be a separate subfund for the credit of moneys realized from sales of bonds issued pursuant to Article XI-F(1) of the Oregon Constitution and ORS 351.350; and there shall be a separate subfund for the credit of moneys realized from sales of bonds issued pursuant to Article XI-G of the Oregon Constitution, and ORS 351.345. The moneys received from the issuance of temporary bonds under ORS 351.470 for the purpose of interim financing pending the sale of the bonds shall also be credited to the appropriate subfund of the Higher Education Bond Building Fund. The moneys in the fund hereby are appropriated to defray the costs of the projects to be financed through sale of the bonds and for the purpose of retiring temporary bonds issued under ORS 351.470, and shall not be used for any other purpose, except that such moneys may, with the approval of the State Treasurer, be invested until needed in obligations of the State of Oregon or of the United States Government, or both, having maturity dates of not to exceed two years. If a surplus remains after application to such purpose, the surplus, and earnings from temporary investments, shall be credited to the Higher Education Bond Sinking Fund by the appropriate subfund. [Amended by 1953 c.214 §2; 1957 c.703 §6; 1963 c.58 §6; 1981 c.660 §28]

351.460 Higher Education Bond Sinking Fund. (1) The board shall maintain with the State Treasurer, a Higher Education Bond Sinking Fund, separate and distinct from the General Fund. The Higher Education Bond Sinking Fund shall comprise two separate subfunds to provide for the payment of the principal of and the interest upon the bonds issued under authority of Article XI-F(1) of the Oregon Constitution and ORS 351.350, and under authority of Article XI-G of the Oregon Constitution and ORS 351.345. The moneys in said sinking fund hereby are appropriated for such purposes. The

said fund may be invested by the board in securities as defined in ORS 295.005 (7)(a), (c) and (d) and in Time Certificates of Deposit issued by a bank or trust company authorized to do business in this state in the capacity of a bank or trust company, and the earnings from such investments shall be credited to the appropriate subfunds of such fund.

(2) The Higher Education Bond Sinking Fund shall consist of all moneys received from ad valorem taxes levied pursuant to ORS 351.480, all moneys that the Legislative Assembly may provide in lieu of such taxes, all of the net revenues received from the projects or undertakings for the financing of which the bonds were issued, including gifts, grants and building fees, such unpledged revenues of buildings and projects of like character as shall be allocated by the board, all moneys received as accrued interest upon bonds sold, all earnings from investments of said fund and the proceeds of the sale of refunding bonds. Moneys credited to the Higher Education Bond Sinking Fund shall be credited to the appropriate subfunds of such fund.

(3) The board may credit the Higher Education Bond Sinking Fund with moneys received from either a sale or interfund transfer of land, buildings and facilities. Where such land, buildings or facilities are sold, or the use thereof is rededicated so that a transfer from one subfund to the other is appropriate, the moneys received shall be credited to the appropriate subfund.

(4) The board shall apply student building fees, revenues, gifts and grants for the payment of the principal of and the interest upon the bonds issued under authority of Article XI-F(1) of the Oregon Constitution and ORS 351.350 until such time as the proper subfund of said sinking fund and investments thereof, as supplemented by expected future income will, in the judgment of the board, be sufficient to meet in full the principal of and the interest upon all

such outstanding bonds. Income not thus required for the sinking fund shall be transferred to such other fund and account as the board shall designate.

(5) The said sinking fund shall not be used for any purpose other than those for which the fund was created; but should a balance remain therein after the purposes for which the fund was created have been fulfilled or after a reserve sufficient to meet all existing and future obligations and liabilities of the fund has been set aside, the surplus remaining may be transferred to such other fund as the board may designate.

[Amended by 1963 c.584 §7; 1969 c.513 §1; 1973 c.809 §1; 1981 c.660 §29]

351.470 Temporary bonds. Pending receipt of the proceeds from the expected sale of bonds under the provisions of ORS 351.345 to 351.460, to the State of Oregon or to the United States Government or any agency thereof, the State Board of Higher Education may, with the approval of the State Treasurer, procure interim financing from the State of Oregon, the United States Government or any agency thereof, or from any private lending agency, by issuing to such private or public lending agency temporary bonds, without advertisement of such bonds for sale, in order to finance temporarily building projects authorized by the board pursuant to Article XI-F(1) or Article XI-G of the Constitution of the State of Oregon and ORS 351.160 (1) or (2), if the bond issue to be temporarily financed by the issuance of temporary bonds has been authorized by the State Board of Higher Education and a purchase plan has been formulated with and is being considered by the State of Oregon or the United States Government or any agency thereof. The proceeds from the sale of the bonds shall be deposited in the Higher Education Bond Building Fund and credited to the appropriate subfund of such fund, and shall be used to retire the temporary bonds issued under this section. The principal amount of temporary bonds issued under this section shall

not exceed the principal amount of the bond issue for which a purchase plan has been formulated. The temporary bonds may be extended, renewed or refunded but maturity dates shall in no event be later than two years from the date of issue of the original temporary bonds for the related building project. [1957 c.703 §8; 1963 c.584 §8]

351.480 Tax levy for higher education purposes. Each year the Department of Revenue shall determine the amount of revenues or other funds that are available and the amount of taxes, if any, that should be levied in addition thereto, to meet the requirements of ORS 351.160 to 351.190, 351.345 to 351.460 and 351.480 to 351.500, for the ensuing fiscal year. Such additional amount shall be apportioned, certified to, and collected by the several counties of the state in the manner required by law for the apportionment, certification and collection of other ad valorem property taxes for state purposes. The amounts of ad valorem taxes levied under authority of this section shall be remitted in full by the several county treasurers to the State Treasurer in the manner and at the times prescribed by law and shall be credited by the State Treasurer to the appropriate subfund of the Higher Education Bond Sinking Fund. [Amended by 1963 c.584 §9]

351.490 Federal aid; donations; acceptance and use. The board may, in its discretion, accept financial assistance and grants, either in the form of money or labor, from the United States or any of its agencies, subject to the terms and conditions thereof, regardless of any laws of this state in conflict with the regulations of the Federal Government with respect thereto, and may also accept from others any donation or grant of land or gift of money or other valuable gift or thing, for any of the purposes contemplated by Article XI-F(1) and Article XI-G of the Oregon Constitution, ORS 351.160 to 351.190, 351.345 to 351.460 and 351.480 to 351.500. Unless enjoined by the terms or conditions of any such gift or grant, the board

may convert the same, or any of them, into money, through sale or disposal thereof. [Amended by 1963 c.584 §10]

351.500 Repealed statutes continued effective until bonds redeemed. Outstanding bonds issued under article 3, chapter 36, title 111, O.C.L.A., and chapter 41, title 111, O.C.L.A., shall continue to be valid obligations until they are redeemed in full, and authority granted in connection with said bonds shall continue in effect until they have been so redeemed.

351.510 [Amended by 1957 c.703 §7; 1963 c.584 §11; repealed by 1967 c.454 §119]

351.520 Borrowing money for purchase of real property. In carrying out the power and authority granted by ORS 351.140, the board of higher education may borrow money and notes, bonds or other evidences of indebtedness may be issued, secured by the pledge of the real property to be acquired and revenues, as provided in ORS 351.140. Such evidences of indebtedness shall be issued in accordance with the provisions of ORS 286.031 to 286.061. [Amended by 1981 c.880 §30]

351.530 Obligations under ORS 351.140 or 351.520 not indebtedness of state or board. No obligation of any kind incurred under ORS 351.140 or 351.520 shall be, or be considered, an indebtedness of the State of Oregon, or to create a general indebtedness of the board of higher education. Any contract of purchase, note or bond or other obligation issued by said board shall limit its payment to the property and income or revenues pledged to secure its payment.

351.540 Special checking account of board of higher education. (1) Unless otherwise provided by law or by federal order or regulation with respect to federal funds, the State Board of Higher Education, with the ap-

proval of the State Treasurer, may deposit with the State Treasurer any moneys coming into its hands. Moneys so deposited shall be credited by the State Treasurer to a special checking account.

(2) The special checking account may be used for the purpose of clearing items subject to subsequent debit or credit to state funds.

(3) Disbursements may be made by check or order of the board upon the State Treasurer, signed by such officer or administrative head as the board, by motion or resolution, nominates for that purpose. Disbursements shall be made only in payment of claims authorized by law for the ordinary expenditures of the State Board of Higher Education incurred in the operation of the state institutions of higher learning.

(4) Funds in the account established under subsection (1) of this section may be held as petty cash or carried with the State Treasurer in segregated subaccounts, to be disbursed in accordance with subsection (3) of this section. With the approval of the State Treasurer, petty cash funds may be deposited in banks for safekeeping purposes and disbursed therefrom in payment of claims authorized by law by employes of the board authorized by the disbursing officer. The board's duly designated disbursing officer from time to time shall reimburse the petty cash funds or subaccounts upon the presentation of satisfactory evidence of disbursements therefrom pursuant to law. [Amended by 1967 c.454 §31; 1979 c.479 §1]

351.545 Higher Education Isolation Facility Bond Sinking Fund. (1) The board shall maintain with the State Treasurer, a Higher Education Isolation Facility Bond Sinking Fund, separate and distinct from the General Fund. The Higher Education Isolation Facility Bond Sinking Fund shall provide for the pay-

ment of principal and interest of bonds issued under the authority of Article XI-F(1) of the Oregon Constitution and ORS 351.350 in an amount equal to the amount authorized for expenditure by paragraph (b) of subsection (2) of section 3, chapter 709, Oregon Laws 1971, and expended as provided therein. The sinking fund may be invested by the board in securities as defined in ORS 295.005 (7)(a), (c) and (d) and in Time Certificates of Deposit issued by a bank or trust company authorized to do business in this state in the capacity of a bank or trust company, and the earnings from such investments shall be credited to the sinking fund.

(2) The Higher Education Isolation Facility Bond Sinking Fund shall consist of moneys received as net revenues from the isolation facilities for which the expenditure of funds is authorized by paragraph (b) of subsection (2) of section 3, chapter 709, Oregon Laws 1971, including gifts, grants and building fees, moneys received as accrued interest on bonds sold, earnings from investments on the sinking fund, the proceeds of the sale of refunding bonds and any accrued interest on such refunding bonds, moneys received pursuant to ORS 462.280, moneys appropriated to the sinking fund by the Legislative Assembly and moneys received for the purposes of the sinking fund from all other sources. All moneys in the sinking fund are continuously appropriated to the board for the purposes provided in subsection (1) of this section. [1971 c.688 §3; 1973 c.809 §2; 1975 c.550 §13; 1977 c.281 §5; 1977 c.855 §19; 1981 c.660 §31]

351.550 [Repealed by 1979 c.479 §2]

351.555 Investment of undistributed bond funds. Whenever bonds are issued pursuant to the provisions of Article XI-G of the

Oregon Constitution, all undistributed bond funds and revenue received as payment, if invested, shall be invested to produce a yield less than the yield produced by arbitrage bonds as defined in subsection (d) of section 103 of the Internal Revenue Code of 1954. [1971 c.709 §13]

351.560 [Amended by 1967 c.255 §1; 1967 c.454 §32; 1971 c.80 §2; repealed by 1979 c.479 §2]

351.570 [1961 c.577 §2; 1965 c.585 §1; renumbered 348.010]

351.580 Use of federal funds for architectural and engineering planning. Notwithstanding any appropriations or moneys made available by law, and notwithstanding any other provision made for appropriations to the Department of Higher Education under chapter 404, Oregon Laws 1967, the State Board of Higher Education is authorized to undertake architectural and engineering planning with moneys provided from the Federal Government or from other sources. Such moneys, including reimbursement for planning, are continuously appropriated for planning purposes. [1967 c.404 §5]

351.590 Higher Education Athletic Fund. (1) The State Board of Higher Education shall maintain with the State Treasurer a separate fund known as the Higher Education Athletic Fund in which shall be deposited all intercollegiate athletic revenue from gate receipts, television royalties, and other sources related to intercollegiate athletic events.

(2) Disbursements from the fund, including any interest credited thereto, may be made for necessary expenses for supplies, services and equipment associated with the intercollegiate athletic program, including recruiting, training and grant-in-aid to intercollegiate athletes.

(3) The fund may be invested by the State Treasurer in securities which constitute legal investments as defined in ORS 295.005 (7). The earnings from such investments shall be credited to the fund. [1975 c.558 §7]

351.605 [Formerly 351.120; amended by 1961 c.558 §1; 1963 c.328 §1; renumbered 348.210]

351.610 [1963 c.539 §2; renumbered 348.220]

351.615 Higher Education Auxiliary Enterprise Building Repair and Equipment Replacement Fund. Moneys set aside by higher education auxiliary activities for repair and alteration of buildings and replacement of equipment shall be credited to a special fund in the State Treasury, separate and distinct from the General Fund, to be designated Higher Education Auxiliary Enterprise Building Repair and Equipment Replacement Fund. The fund may be invested by the State Treasurer in securities which constitute legal investments as defined in ORS 295.005 (7). The earnings from such investments will be credited to the fund for distribution to the several auxiliary activities in accord with rules to be adopted by the board. The moneys in the Higher Education Auxiliary Enterprise Building Repair and Equipment Replacement Fund are continuously appropriated for the repair and alteration of auxiliary enterprise buildings and replacement of equipment as designated by the board, after hearing any recommendations by recognized student governments. [1979 c.106 §2]

4. 1972 U.S. Code & Cong. Admin. News 2155

EDUCATIONAL INSTITUTION EMPLOYEES

The present Section 702 of Title VII exempts educational institutions employees connected with educational activities from the equal employment requirements. The bill removes this exemption (Section 3 of the bill).

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees - primarily teachers - from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have generally been relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.

When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGee, it

determining the hiring of male faculty members were prestige and compatibility, but that women were generally considered to be outside of the prestige system altogether.[1]

The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act.

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[1] See generally, Kaplow and McGee, The Academic Marketplace, Anchor Edition (Garden City: 1965).